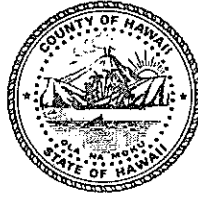


Harry Kim  
Mayor



Christopher J. Yuen  
Director

Roy R. Takemoto  
Deputy Director

## County of Hawaii

### PLANNING DEPARTMENT

25 Aupuni Street, Room 109 • Hilo, Hawaii 96720-4252  
(808) 961-8288 • Fax (808) 961-8742

#### FAXED (808-334-1210) AND MAILED

August 23, 2002

Mr. Leo Fleming, P.E.  
P. O. Box 396  
Kailua-Kona, HI 96745

Dear Mr. Fleming:

**VARIANCE APPLICATION WH (VAR 02-037)**  
**VARIANCE FILE NO. 1303 WH (VAR 02-037)**  
**Applicants: LEO FLEMING, C.E./ROBERT RICE, ET AL.**  
**Owners: ROBERT RICE, ET AL./**  
**DBA KONA HORIZONS, LTD.**  
**Request: Variance from Chapter 23, Subdivisions,**  
**Article 6, Division 2, Improvements Required,**  
**Section 23-84, Water Supply (1) (2)**  
**Tax Map Key: 8-7-014:006 & 011 (SUB 01-0155)**

After reviewing your application and the information submitted, the Planning Director is denying your variance request for a 45-lot subdivision of the subject TMK property(s) without providing a water system to any lots shown on the subdivision's preliminary plat map (PPM). The applicants (Leo Fleming, C.E., Et al.) requested a variance to allow a 45-lot subdivision of property(s) without providing a water system improvements required by the Hawaii County Code and pursuant to Chapter 23, Subdivisions, Division 2, Improvements Required, Section 23-84, Water Supply, (1) (2).

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AUG 23 2002

## **BACKGROUND AND FINDINGS**

1. **Location.** The subject TMK property(s), consisting of 294 +/- acres, is located at Opihihale 2<sup>nd</sup>, South Kona, Hawaii.

The property is zoned Agricultural (A-5a) by the County (Note: The property's zoning was changed from Unplanned (U) to Agricultural (A-5a) when the amendments to the County Zoning Code were ratified by the Council.) The property(s) are designated Agricultural "A" by the Land Use Commission (LUC). A portion of the property is located within the County's Special Management Area (SMA).

**Note:** According to the subdivision background report, the subject property(s) are designated "Orchards" pursuant to the County General Plan (LUPAG Map). Thus, the subject property(s) are generally rocky in character and suitable for macadamia nuts, papayas, citrus and other similar type agricultural crops.

### **Chapter 23, Subdivisions, and County General Plan.**

Chapter 23, Article 6, Division 2, Improvements Required, Section 23-84, Water Supply states "A subdivision to be laid out after December 21, 1966 shall be provided with water as follows:

- (1) A water system meeting the minimum requirements of the County department of water supply; and
- (2) Water mains and fire hydrants installed to and within the subdivision in accordance with the rules and regulations of the department of water supply, adopted in conformity with article VIII of the Charter."

The County General Plan's-"WATER"- Element or "POLICIES", states in part:

"Water system improvements and extensions shall promote the County's desired land use development pattern.

"All water systems shall be designed and built to Department of Water Supply standards.

"The fire prevention systems shall be coordinated with water distribution systems in order to ensure water supplies for fire protection purposes.

"The County shall consider the feasibility, desirability, and the attendant responsibilities of establishing standards for individual water catchment units.

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“Water systems shall meet the requirements of the Department of Water Supply and the Subdivision Control Code.”

2. **Subdivision Application (SUB 01-0155)**. The applicant-owner (Robert Rice, Etal.), submitted a subdivision application (SUB 00-0155) which includes an undated preliminary plat map. Further action on the proposed 45-lot subdivision application has been deferred pending resolve of the subdivision’s water system requirements.
3. **Variance Application-Variance Site Plan Map**. Leo Fleming, C. E., on behalf of the applicants/owners, submitted a variance application to the Planning Department on June 24, 2002.

4. **Agency Comments and Requirements WH (VAR 02-037):**

- a. The DWS memorandum dated July 17, 2002 states:

“We have reviewed the subject application.

Please refer to our memorandum of January 25, 2002, for subdivision application No. 2001-155. We have no additional comments to offer.

Should there be any questions, the applicant may contact our Water Resources and Planning Branch at 961-8070.”

The referenced DWS memorandum dated January 25, 2002 in the subdivision application file (SUB 01-0155) states:

“Please be informed that the proposed subdivision is not within the service limits of the Department’s existing water facilities.

The nearest Department of Water Supply water system facility is at the end of an existing 8-inch waterline along the Mamalahoa Highway approximately 7.5 miles from the property.”

- b. No comments were received from The County of Hawaii Fire Department (HFD).
- c. The State Department of Health (DOH) memorandum dated July 26, 2003 (sic) in the variance file states:

“The Department of Health’s Safe Drinking Water Branch authority on drinking water quality is based on the definition of a “public water system.” A “public water system” means a system which provides water for human consumption through pipe or other constructed conveyance if such system has fifteen (15) service connections or regularly serves an average of at least twenty-five (25) individuals daily at least sixty (60) days out of the year. All public water systems are regulated by the Department of Health and shall be in compliance with the Hawaii Administrative Rules, Title 11, Chapter 20. Recommend the subdivision lots be connected to an existing public water system.

Concerns on water quality for lead, copper, algae and microbiological and chemical contaminations in private water systems have identified the need for self-monitoring. The Department of Health does not support the use of these private rain catchment systems for drinking purposes since the quality may not meet potable water standards.

The supplement well source may designate the water system as a public water system. Please contact the Safe Drinking Water Branch in Honolulu (586-4258) for information.”

5. **Notice to Surrounding Property Owners.** It appears that the applicant (Fleming) sent a notice(s) to surrounding property owners. Proof of mailing a notice of the variance application to surrounding property owners on or about July 15, 2002 was submitted for the record.
6. **Comments from Surrounding Property Owners or Public.** Several telephone calls/inquiries were received and one written objection letter dated July 23, 2002 together with exhibits was received from Brian J. De Lima, Esq., on behalf of Stanley Roehrig-a landowner of property adjacent to the subject property(s).

#### **SPECIAL AND UNUSUAL CIRCUMSTANCES**

The applicant intends to subdivide the existing property(s) to create 45 new lots. No lot will have a water system meeting the requirements of the Subdivision Code or County General Plan. The applicant(s) statements (April 26, 2002) include:

“The alternative of drilling one or two wells for a County standard water system to serve these lots and for a private developer to extend the County’s water system for the proposed lots would be prohibitive and unreasonable when prorated on a per lot basis.

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Due to the current inability of the Department of Water Supply to provide adequate water for the subdivision of this parcel, the owners find that they would be substantially deprived of their property rights by not being able to subdivide their property, unless this variance were granted.

It is our contention that the granting of this variance and the allowing of property owners to supply their own water via a catchment and storage system is a viable alternative. We would suggest a minimum storage capacity of 13, 000 gallons for home use and on-site fire protection, together with a minimum catchment roof are of 1,500 sq. ft.”

In other letter(s) dated May 19, 2002 and June 9, 2002, the applicants have stated:

“Further, and we imagine in the Rice’s favor; they have drilled a well, successfully. It can and will be utilized as necessary to supplement subdivision household catchment storage should the need arise.”

“As stated in our supplemental information letter of May 19th, the Rice’s have drilled a well which has been tested at a flow rate in excess of 300 g.p.m. while maintaining an acceptable draw-down level and salinity rate. This well will be utilized as may be necessary to supplement subdivision household catchment storage should the need arise.”

The property’s zoning requires that a proposed subdivision must result in the creation of lots being a minimum 5 acres or larger. The proposed subdivision is located in a rural area where the character of the property and adjoining areas have not changed in this part of the South Kona District during the last 40 to 50 years. Because of the rural location, land character, and other demographic factors and projections for the area, the expectations of development and justification for expenditures of public money to expand the public water infrastructure to the subject property(s) and immediate areas remain remote at this time.

The imposition of water requirements are applied on a uniform basis for subdivision proposals. In this instance, the applicant(s) is requesting a variance to create 45 new lots with a condition that private water catchment systems be allowed for potable and emergency needs for 45 household spread out over nearly 300 acres. Current rainfall (mean annual) information show the property(s) receive approximately 40 inches of rainfall annually (State of Hawaii Commission on Water Resource Management rainfall gage station Opihihale 2 (station #24.1). According to other rules of the Planning Department (Planning Department Rule §12-4), a standard of 80” mean annual rainfall is determined to be adequate for a reliable catchment system. Adding such a relatively high density of lots to an area with very marginal rainfall for normal domestic needs using a catchment system is not good planning. The burden to supplement drinking water needs by purchasing potable drinking water during dry years would be on the future lot owners and not

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the applicant.

The mere fact that the property is being subdivided and comports to the Zoning density and the cost to develop the necessary water supply and distribution system is not of itself enough to justify the subdivision or to the granting of this variance.

Therefore, considering the variance background, the variance submittals, and other information received, it is felt there are no special or unusual circumstances applying to the subject property which exist either to a degree which deprive the applicant or owner(s) of substantial property rights that would otherwise be available, or to a degree which obviously interferes with the best use or manner of development of the subject property.

#### **ALTERNATIVES**

Alternatives available to the applicant include the following actions:

1. Improve and extend the existing public water system to allow the proposed 45-lot subdivision, pursuant to Chapter 23, Subdivisions.
2. Test the private well on the property or develop a private water supply and construct a private water distribution system within the subdivision meeting the requirements of the DOH under the Safe Drinking Water Act.

Although the extension of the County water system would result in substantial cost, the existence of a tested well provides a reasonable alternative to provide a "public water system" within the meaning of the Safe Drinking Water Act. This "public water system" would be privately developed and operated, but subject to the Safe Drinking Water quality monitoring requirements.

#### **INTENT AND PURPOSE**

The intent and purpose of requiring a water system for and within a proposed subdivision is to assure that adequate water is available for human consumption and fire protection. It is the County's General Plan policies and standards that water system improvements and extensions shall promote the County's land use development pattern, that all new developments have safe and reliable water systems, and that fire emergency needs are coordinated to ensure there is adequate water in the event of an emergency. While the proposed size of the lots would be consistent or exceed the minimum lot size pursuant to zoning, the variance to allow 45 or more private water catchment systems throughout 300 acres without a safe and reliable water system would not be consistent with the intent and purpose of the County General Plan and the County Subdivision Code. The alternative to allow a large number of private water catchment systems would be detrimental to the public's welfare and set a precedent to allow other large or similar

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subdivision developments to be developed under similar circumstances.

Based on these the findings, the approval of the variance request to allow or create a proposed 45-lot subdivision without a public water system would not 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.

### **PLANNING DIRECTOR'S DECISION AND OTHER REQUIREMENTS**

This denial of your variance request requires you to withdraw your preliminary plat for a proposed 45-lot subdivision. Any proposed subdivision of the subject TMK property(s) is subject to the minimum DWS requirements and any other requirements of Chapter 23, Subdivisions.

The 45-lot PPM for SUB 01-0155 or (undated) PPM received on December 26, 2001 is hereby declared null and void.

In accordance with a recent charter amendment and Ordinance No. 99-112, you may appeal the director's decision and request the following:

- (a) Any person aggrieved by the decision of the director in the administration or application of this chapter, may, within thirty days after the date of the director's written decision, appeal the decision to the board of appeals.
- (b) A person is aggrieved by a decision of the director if:
  - (1) The person has an interest in the subject matter of the decision that is so directly and immediately affected, that the person's interest is clearly distinguishable from that of the general public: and
  - (2) The person is or will be adversely affected by the decision.
- (c) An appeal shall be in writing, in the form prescribed by the board of appeals and shall specify the person's interest in the subject matter of the appeal and the grounds of the appeal. A filing fee of \$250 shall accompany any such appeal.

The person appealing a decision of the director shall provide a copy of the appeal to the director and to the owners of the affected property and shall provide the board of appeals with the proof of service.

- (d) The appellant, the owners of the affected property, and the director shall be parties

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to an appeal. Other persons may be admitted as parties to an appeal. Other persons may be admitted as parties to an appeal, as permitted by the board of appeals.

The board of appeals may affirm the decision of the director, or it may reverse or modify the decision, or it may remand the decision with appropriate instructions if based upon the preponderance of evidence the board finds that:

- (1) The director erred in its decision; or
- (2) The decision violated this chapter or other applicable law; or
- (3) The decision was arbitrary or capricious or characterized by and abuse of discretion or clearly unwarranted exercise of discretion.

In view of the above, we have enclosed GENERAL PETITION FOR APPEAL OF DECISIONS BY PLANNING DIRECTOR.

Sincerely,



CHRISTOPHER J. YUEN  
Planning Director

WRY/CJY:pak  
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Enclosure

xc: SUB 01-0155  
DWS-Engineering Division  
Planning Dept. – Kona  
Brian De Lima, Esq.



COUNTY OF HAWAII  
BOARD OF APPEALS

GENERAL PETITION FOR APPEAL OF DECISIONS BY PLANNING DIRECTOR

(Type or legibly print the requested information)

APPELLANT: \_\_\_\_\_

APPELLANT'S SIGNATURE: \_\_\_\_\_ DATE: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

TELEPHONE: (Bus.) \_\_\_\_\_ (Home) \_\_\_\_\_

APPELLANT'S INTEREST IN THE SUBJECT MATTER OF THE APPEAL: \_\_\_\_\_

APPELLANT'S GROUNDS FOR APPEAL: \_\_\_\_\_

LAND OWNER: \_\_\_\_\_

TMK: (land in question) \_\_\_\_\_ AREA: \_\_\_\_\_

STREET ADDRESS OF PROPERTY: \_\_\_\_\_

APPELLANT'S REPRESENTATIVE: \_\_\_\_\_

REPRESENTATIVE'S SIGNATURE: \_\_\_\_\_

REPRESENTATIVE'S ADDRESS: \_\_\_\_\_

DATE: \_\_\_\_\_ TELEPHONE: (Bus.) \_\_\_\_\_

THIS PETITION MUST BE ACCOMPANIED BY A FILING FEE OF TWO HUNDRED FIFTY DOLLARS (\$250) PAYABLE TO THE COUNTY DIRECTOR OF FINANCE AND:

- The Original and ten (10) copies of this completed petition with the following:
  - a. A description of the property in sufficient detail for the public to precisely locate the property.
  - b. A statement explaining the nature of the appeal and the relief requested.
  - c. A statement explaining:
    - (i) How the director or commission erred in its decision; or
    - (ii) How the decision violates the Zoning Code or other applicable law; or
    - (iii) How the decision was arbitrary or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.
  - d. A clear and concise statement of any other relevant facts.

Proof of Service by the Appellant on the Planning Director for an appeal from the Planning Director's decision relating to the Zoning Code.

A list of the names, address and tax map keys of all owners of property within boundaries established by Section 8-11(d) of the Board of Appeals Rules of Practice and Procedure.