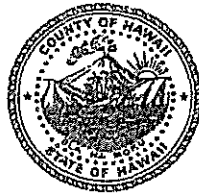


Harry Kim
Mayor



Christopher J. Yuen
Director

Roy R. Takemoto
Deputy Director

County of Hawaii

PLANNING DEPARTMENT

101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720-3043
(808) 961-8288 • Fax (808) 961-8742

April 30, 2003

Ms. Chi Huynh, President
AVAI CORPORATION
2357 Kilauea Avenue
Hilo, HI 96720

Dear Ms. Huynh:

VARIANCE PERMIT NO. 1356 (VAR 03-006)

Applicant: AVAI CORPORATION

Owner: AVAI CORPORATION

**Request: Variance from Chapter 23, Subdivisions,
Article 6, Division 2, Improvements Required,
Section 23-84, Water Supply, (1) (2)**

Tax Map Key: 1-3-008:004 (SUB 00-0136)

After reviewing the subject variance application and information submitted, the Planning Director certifies the approval of your variance from Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-84, Water Supply, (1), to allow a subdivision of the subject TMK property without providing a water system improvements meeting with the minimum requirements of the Department of Water Supply (DWS) to 11-lots being proposed by the pending 18-lot subdivision.

The Planning Director has concluded that the variance from the minimum subdivision water system requirements to allow the proposed subdivision application be approved based on the following findings:

BACKGROUND

1. **Location.** The subject property, consisting of 413 + acres, is Lot 4-A-1 of Land Court Application No. 1800 (Amended), is situated at Pohoiki and Keahialaka, Puna, Hawaii.

035615
MAY " 2 2003

2. **Zoning.** The subject property is zoned Agricultural (A-1a) by the County and designated Agriculture (A) by the State Land Use Commission (LUC).
3. **Subdivision Request/PPM.** The original subdivision application (SUB 00-0136) includes a preliminary plat map (PPM), dated September 1, 2000, to subdivide Lot 4-A-1 into eighteen (18) lots. Further action on the proposed 18-lot subdivision application has been deferred pending resolve of the water and other requirements pursuant to letter dated October 18, 2000 in SUB 00-0136. (Note: Variance conditions require the subdivider or current owner(s) to submit a revised PPM addressing lot size, lot geometry, subdivision access, and other roadway issues).
4. **Variance Application.** The applicant submitted the subject variance application on or about January 29, 2003.
5. **Agency Comments and Requirements (VAR 03-006):**
 - a. Hawaii County Fire Department's memorandum is dated March 5, 2003. (Refer to memorandum in variance file).
 - b. The State Department of Health (DOH) memorandum dated March 5, 2003 states:

“Under current rules, cesspools are allowed on these lots. However, rule changes may require septic systems in the future.”
 - c. The Department of Water Supply (DWS) memorandum dated April 25, 2003 states in part:

“We have reviewed the subject Variance Application and have the following comment.

Please refer to our memorandum of October 12, 2000, for our comments and requirements.”

The DWS memorandum dated October 12, 2000 in SUB 2000-0136 states in part:

Ms. Chi Huynh, President
AVAI CORPORATION
Page 3
April 30, 2003

“We have reviewed the subject application for the proposed subdivision and have the following comments.

Please be informed that the Department’s existing water system facilities cannot support the proposed subdivision at this time. Extensive improvements and additions, including source, storage, transmission, booster pumps, and distribution facilities must be constructed. Currently, sufficient funding is not available and no time schedule is set.”

6. **Notice to Surrounding Owners.** The applicant submitted copy of notice(s) and proof of mailing to surrounding property owners. Pursuant to these submittals, it appears that notices to surrounding owners were mailed on or about January 30, 2003 and February 20, 2003.
7. **Comments from Surrounding Property Owners or Public.** No other agency comments or objections were received. No objections from the surrounding property owners or public to the subject variance request or application were received.

Therefore, after considering the current public water system improvements, subdivision and variance application’s background information, rainfall information provided by the applicant, and other agency comments, the Planning Director has determined that there are special or unusual circumstances applying to the TMK property which exist either to a degree which deprive the applicant or successors/owners of property rights that would otherwise be available or to a degree which interferes with the development or subdivision of the subject TMK property.

ALTERNATIVES

The alternatives to provide a water system to service all lots of the proposed subdivision of the TMK property are limited. The first alternative requires the applicants to extend or improve the existing county water system and provide the necessary 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.

As such, the imposition of improving the existing public water system or providing an approved alternative water system for eleven (11) lots of the proposed 18-lot subdivision would be putting excessive demands upon the applicants when a more reasonable alternative is available.

Ms. Chi Huynh, President
AVAI CORPORATION
Page 4
April 30, 2003

INTENT AND PURPOSE-WATER VARIANCE

The intent and purpose of requiring a water system for a subdivision is to assure that adequate water is available for human consumption and fire protection.

The analysis of the approximate subdivision's location on official maps at the DWS, Planning Department, and rainfall information provided by the applicant, show that there is adequate rainfall within the subject property and surrounding areas to support individual or separate private rainwater catchment systems for potable and emergency uses. According to rainfall data and the applicant's background which states in part:

"According to the information provided by the State's Commission on Water Resources Management, the nearest rain gauges in this area (sic) are Kapoho Beach and Kapoho Landing."

"Over the past 75 years, the annual median rainfall in these areas is over 90 inches. In 1996, the annual median rainfall for these areas is over 90 inches. In 1996, the annual median rainfall ranged between 87.8 to 101.8 inches. In 1997, it ranged between 88.6 and 121.6 inches."

According to a map "WATER-RESOURCES INVESTIGATION REPORT 95-4212-PLATE 6", the location of the proposed subdivision appears to receive between 80 to 120 inches of rain yearly.

The provisions for water storage, water distribution, and construction of private rain water catchment system(s) for 11-proposed lots will be addressed by the applicant/owner or future lot owner(s). The State Department of Health has no specific rules or regulations relating to the utilization, construction or inspection of private roof catchment water systems for potable or emergency uses.

Although the subject property is zoned A-1a, the original subdivider or current owners have submitted a preliminary subdivision map requesting subdivision to lots of 10 acres or more in size. The TMK parcel's Agricultural (A-1a) zoning or minimum lot size (1 acre) is not a desirable land pattern for the area because of the following:

- (1) The entire property is located near the northeast rift zone of Kilauea Volcano and within Lava Hazard Zones 1 and 2 (Geographically, it appears that the TMK is entirely situated within Zone 1). Zone 1 is the most hazardous and frequent eruptions originate in this area; especially, during the past 20 years.

Ms. Chi Huynh, President
AVAI CORPORATION
Page 5
April 30, 2003

- (2) Pohoiki Road (County Right-of-Way) and adjoining State owned rights-of-ways are substandard. The current roadway alignment and geometry of Pohoiki Road has not been changed or significantly modified during the past 40 + years. Multiple access points and intersections proposed near curves must be reevaluated and addressed by the developer and agencies.
- (3) There is an abundance of unoccupied 1-acre and smaller subdivided lots nearby (Leilani Estates, Hawaiian Paradise Park Subdivision, Nanawale Estates Subdivision, etc.) or throughout Puna District.

The subject variance application was acknowledged by letter dated February 13, 2003. Additional time was required to consider the status of developer and other infrastructure improvements for the pending subdivision, and further DWS comments and concerns regarding the subdivision request was necessary. The applicant or owner(s) agreed to extend the decision date to on or before May 7, 2003.

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.

VARIANCE DECISION-CONDITIONS

The variance request to allow the applicant's proposed 18-lot subdivision of the subject TMK property (11-lots without a water system meeting DWS standard) is approved subject to the following conditions:

1. The owners, their assigns, or successors shall be responsible for complying with all stated conditions of approval.
2. Prior to final subdivision approval (SUB 00-0136), the subdivider/owner shall confer with the DWS and designate which 7-lots will be serviced the county water system. The subdivider/owner will be required to comply and meet all DWS requirements before final subdivision approval is granted to SUB 00-0136.

The subdivider, owners, their assigns, or successors will apply for the rezoning of the property to Agricultural A-10a (or to a larger lot size) prior to final subdivision approval is granted to

SUB 00-0136, and shall thereafter diligently pursue the rezoning. If the rezoning is not granted, the subdivider/owner(s) shall include a covenant in all deeds prohibiting further subdivision of the lots created by SUB 00-0136 into parcels less than ten (10) acres in size.

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 00-0136. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting the 11-lots arising from the approval of pending 18-lot subdivision application and shall be duly recorded at the Bureau of Conveyances of the State of Hawaii 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 11-lots without public water created by SUB 00-0136. 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 11-lots created by SUB 00-0136 not serviced by a County water system. No further subdivision of any of the 18 lots created by SUB 00-0136 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
 - c. Any lots created by SUB 00-0136 may not be made subject to a condominium property regime.
 - d. No additional farm dwelling or second farm dwelling shall be permitted on any lots created by SUB 00-0136.

Any farm dwelling constructed on a proposed lot 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 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 Hawaii County Fire Department. The Hawaii 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 00-0136 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 00-0136, the owner(s) of the lot(s) created by SUB 00-0136 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 subject property was created by subdivision of a larger parcel pursuant to a variance from the water supply requirement in Section 23-84 of the Hawaii County Code. The subdivider or grantee, the assigns or successors acknowledges that there are no special or unusual circumstances existing on the property, and therefore, there are no grounds for the subdivider or grantee, the assigns or successors to request a further variance from the water supply requirements to permit further subdivision of the subject property.

Ms. Chi Huynh, President
AVAI CORPORATION

Page 8
April 30, 2003

- i. The subdivider, owner(s), assigns, and successors shall support and diligently pursue the rezoning of the property to Agricultural (A-10a) or larger lot size. If the rezoning is not granted, the owners shall file restrictive covenants prohibiting the further subdivision of the lots into parcels of less than 10 acres.
4. The subdivision's (SUB 00-0136) final plat map (minimum lot size, minimum average lot size requirements, etc.) shall meet all the requirements of the Hawaii County Zoning Code and the Subdivision Code not covered by this variance. No other variance to permit this subdivision shall be granted to allow SUB 00-0136.
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.
6. The variance from water supply does not constitute tentative approval of the original preliminary plat map (PPM) or map dated September 1, 2000 filed in the pending active subdivision file (SUB 00-0136). There are unresolved access and roadway issues with respect to the original PPM dated September 1, 2000, including but not limited to excessive access points from and along Pohoiki Road, location of access on curves (sight distance), and the proposed and excessive use of flag lots. The subdivider or current owner(s) shall submit ten (10) revised preliminary plat maps for review by the agencies.

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

Because the granting of the variance contains a number of significant conditions, the applicant Avai Corporation or successors has/have the right to appeal the variance decision/conditions. Therefore, in accordance with a recent charter amendment and Ordinance No. 99-112, the applicant or successor may appeal the director's decision and variance conditions. You may 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:

Ms. Chi Huynh, President
AVAI CORPORATION
Page 9
April 30, 2003

- (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 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 reverse or modify the decision or 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.

As such, enclosed GENERAL PETITION FOR APPEAL OF DECISIONS BY PLANNING DIRECTOR.

Ms. Chi Huynh, President
AVAI CORPORATION
Page 10
April 30, 2003

Should you have any questions on the variance decision/conditions or wish to appeal the variance decision/conditions, please contact staff in our Hilo office by telephone (808) 961-8288.

Sincerely,



CHRISTOPHER J. YUEN
Planning Director

WRY/CJY:pak
P:\WP60\WRY\FORMLETT\VARAPPSUBTMK13008004.AVAICORP

Enclosure

xc: Manager-DWS
SUB 00-0136
Planning Dept. - Kona