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Mayor



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County of Hawaii

PLANNING DEPARTMENT

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April 23, 2004

Chrystal T. Yamasaki, L.P.L.S.
WES THOMAS ASSOCIATES
75-5749 Kalawa Street
Kailua-Kona, HI 96740

Dear Mrs. Yamasaki:

VARIANCE PERMIT NO. 1415 WH (VAR 03-053)

Agent: WES THOMAS ASSOCIATES
Applicant: JAMES E. WAGENBLAST
Owner(s): JAMES E. WAGENBLAST, ET AL.
**Request: Variance from Chapter 23, Subdivisions,
Article 6, Division 2, Improvements Required,
Section 23-84, Water Supply, (1) (2)**

Tax Map Key: 8-8-019:040, Lot 40 (SUB 03-0087)

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 proposed 4-lot subdivision. The approval of your variance is subject to variance conditions, including the condition that no variance can be requested from the requirement that the road to the subject TMK property or subdivision from the Hawaii Belt Road be improved per Department of Public (DPW) standards.

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

"Hawai'i County is an equal opportunity provider and employer"

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BACKGROUND

1. **Location.** The subject property, Lot 40 consisting of 20.216 acres of Honomolino Acres and being portions of Grant 3723 to J. M. Monsarrat and Grant 4659 to W. C. Achi, is situated at Papa 2nd and Anapuka, South Kona, Hawaii.
2. **Zoning.** The subject property is zoned Agricultural (A-5a) by the County and designated Agriculture (A) by the State Land Use Commission (LUC).
3. **Subdivision Request/PPM.** The applicant's surveyor submitted a subdivision application (SUB 03-0087) which includes a preliminary plat map (PPM), dated June 13, 2003, to subdivide subject TMK property (lot 40) into four (4) lots. Further action on the proposed 4-lot subdivision application was deferred pursuant to letter dated August 26, 2003 in SUB 03-0087.
4. **Variance Application.** The applicant submitted the subject variance application on or about September 30, 2003.

For the Record: The subject TMK property (Lot 40) was created by a 41-lot subdivision (Honomalino Acres Subdivision) on July 5, 1978 (SUB 4146). The previous property owners of Lot 40 (Decker, Et al.) submitted a proposed a 4-lot subdivision of Lot 40 on or about October 25, 1979 (SUB 79-239).

A Department of Water Supply (DWS) memorandum, dated December 14, 1979, in SUB 79-239 file states in part:

"Pursuant to Article II, Section 5.01 of the Subdivision Control Code, the subdivider is required to provide a dedicable water system meeting our minimum water requirements as stipulated as stipulated in our Rules and Regulations, unless a waiver is granted by this Department."

A subsequent DPW memorandum, dated January 10, 1980, states in part:

"Please be informed that your request for a waiver of our minimum water requirements for your proposed subdivision is hereby approved."

In addition, Decker, Et al., filed a variance request from the minimum building site average width requirements **and** subdivision's minimum roadway

requirements. A variance from the minimum building site average width requirements was granted on or about February 12, 1980 and the variance from minimum roadway improvement requirements for the proposed 4-lot subdivision were **denied** based on the following:

- “1. That there are no special or unusual circumstances applying to the subject property which do not generally apply to surrounding property or improvements in the same district. Road “A”, which is the subject of the roadway request, provides access for all 41 lots in the Honomolino Acres Subdivision. A number of these lots have the potential for further subdivision to a minimum lot size of five acres. All these parcels are faced with the same development restrictions as the subject property.
2. That the granting of the variance will constitute a grant of special privilege inconsistent with the limitations upon other properties under identical district classification. Nine parcels within the Honomolino Acres Subdivision has (sic) the potential to be further subdivided to create 20 additional lots. This would increase the number of lots served by Road “A” to a total of 61 lots. If we are to treat all of these properties consistently, this variance request must be denied.
3. That the approval of the request would be contrary to the purpose and access provisions of the Subdivision Control Code. The purpose and intent of the access provision of the Subdivision Control Code is to provide for the safe and efficient movement of people and goods. In the case of areas zoned for three (3) acre lots or larger the Subdivision Control Code requires a fifty (50) foot wide right-of-way with a twenty (20) foot wide pavement or oil-treated surface. As compared to residential private road subdivision standards there is no provision for reducing right-of-way and pavement width for private roads. The only difference is the treatment of the travel surface, that is, paved or oil-treated.

The petitioner proposes to utilize a 12'-wide pavement within 30' graded width. Sections of the existing 12'-wide paved road do not allow for two (2) way traffic and is hazardous. Vegetation growing

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within the 30' graded width has significantly reduced the usable section of the roadway. Furthermore, the grading of the roadway without any additional improvements proposed by the petitioner will not provide for the safe and efficient movement of people and goods."

In sum, the variance request from minimum roadway requirements by the previous owners of Lot 40 was denied pursuant to Chapter 23, Subdivisions, Section 23-15 (a) (b) and especially, (c), which states:

"The variance will be consistent with the general purpose of the district, the intent and purpose of this chapter, and the County General Plan and will not be materially detrimental to the public welfare or cause substantial, adverse impact to an area's character or to adjoining properties."

And, the approval of a variance from the minimum subdivision roadway requirements to allow subdivision of Lot 40 then or now of other remaining large lots within Honomolino Acres Subdivision could be viewed as a precedent to permit future subdivisions or development with the immediate area.

Decker, Et al. appealed to the Planning Commission, the Planning Director's denial action on the variance request from the subdivision's minimum roadway requirements (PC/AP NO. 3) on or about March 3, 1980. On May 8, 1980, the Planning Commission voted to uphold the Planning Director's denial action on the variance from the minimum roadway requirements. As such, VAR NO. 3 granted to Decker, Et al. and dated August 26, 1980, is a variance from the minimum building site average width requirements only.

The PPM of SUB 79-239 by Decker, Et al. was granted tentative subdivision approval on April 3, 1980 and declared null and void September 1, 1981.

In addition, a subdivision of Lot 1 (TMK: 8-8-019:001), created by SUB 4146 in 1978, was submitted on or about February 10, 1995. Records show VAR 701 was approved on October 16, 1995 to allow proposed 6-lot subdivision of Lot 1 (SUB 95-031) to be created without providing a water system meeting the requirements of Chapter 23, Subdivisions. The proposed 6-lot subdivision of TMK: 8-8-019:001 was granted final subdivision approval (SUB 6766) on October 3, 1996.

5. **Agency Comments and Requirements (VAR 03-053):**

- a. The Hawaii County Fire Department's memorandum is dated October 22, 2003. (Refer to memorandum in variance file).
- b. The State Department of Health (DOH) memorandum is dated November 13, 2003. (Refer to memorandum in variance file).
- c. The Department of Water Supply (DWS) memorandum, dated December 18, 2003, states in part:

"We have no objections to the subject application as the closest water system facility is along the Mamalahoa Highway approximately 12 miles from the property."

6. **Notice to Surrounding Owners.** The applicant submitted a transmittal letter dated October 20, 2003 and proof of mailing sent to surrounding property owners. Pursuant to these submittals, it appears that a notice was mailed on or about October 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 circumstances, variance background information, rainfall information provided by the applicant, and 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 applicants or owners of 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

There are no other reasonable alternatives in resolving the difficulty of the applicants. 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.

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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 nearest public water system or DWS system located approximately 12 miles away or providing an approved alternative water system on the property for the proposed four (4) lot subdivision would be putting excessive demands upon the applicants when a more reasonable alternative is available.

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.

The analysis of existing site conditions, official maps at the DWS and Planning Department, and rainfall information provided by the applicant appear to indicate 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 for the proposed 4-lots. According to an extract of a map- Plate 6-WATER-RESOURCES INVESTIGATIONS REPORT 95-4212, submitted by the applicant, denoting the approximate location of the proposed subdivision or "SUBJECT PROPERTY (approx. location)" and proximity to the nearest active rain gage station("2.34"). The analysis of the applicant's submittals and other rainfall data indicate the property receives approximately 60 +/- inches of rainfall yearly.

A similar variance (VAR 701) request was granted in 1995 to allow a 6-lot of property of Lot 1 created in 1978 by the Honomolino Acres Subdivision with frontage along the Hawaii Belt Road.

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.

The provisions for water storage, water distribution, and construction of private rain water catchment system(s) for the proposed lots will be addressed by the applicants or future lot owner(s).

The subject variance application was acknowledged by letter dated October 9, 2003. Additional time was required to consider the DWS comments, other agency comments for the proposed 4-lot subdivision, and past development near the proposed subdivision was necessary. Pursuant to

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letter received on April 20, 2004, the applicant on behalf of the owners, agreed to extend the decision date to on or before April 30, 2004.

Based on the foregoing findings, the subject 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 General Plan Hawaii County. 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. If, however, the subdivision created additional lots without meeting minimum road requirements, it would not be consistent with the intent and purposes of the Subdivision Code, Zoning Code, and The General Plan Hawaii County.

VARIANCE DECISION-CONDITIONS

The variance request to allow a proposed 4-lot subdivision of the subject TMK property without providing a water system meeting DWS standards is approved subject to the following variance conditions:

1. The 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 within one (1) year from the issuance of tentative subdivision approval and prior to receipt of final subdivision approval of SUB 03-0087. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting the all lots arising from the approval of pending 4-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 additional lot without public water created by SUB 00-0093. 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.

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- 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 lot created by SUB 03-0087 not serviced by a County water system. No further subdivision of the lots created by SUB 98-0093 will be permitted unless county water system requirements and other requirement of Chapter 23, Subdivisions, are met.
- c. Any lots created by SUB 03-0087 may not be made subject to a condominium property regime.
- d. No additional farm dwelling or second farm dwelling shall be permitted on any lot create by SUB 03-0087.
- e. 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 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 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 03-0087 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 03-0087, the owner(s) of the lot(s) created by SUB 03-0087 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 minimum roadway requirements or other agency requirements to permit SUB 03-0087, or any further subdivision of parcels resulting from SUB 03-0087 without full compliance with the standards of Chapter 23, Subdivisions.
3. The subdivider, owner(s), their assigns or successors shall construct a minimum 20 feet wide agricultural pavement within existing 60 feet wide right-of-way (Road "A") conforming to DPW Standard Detail R-39, from the Hawaii Belt Road to proposed 4-lot subdivision's access-"EASEMENT 1". Where grades are 8% or greater, the roadway section shall paved per DPW Standard Detail R-34.
 4. The subdivision's (SUB 03-0087) final plat map shall denote and identify the location of any structures, water tank, cesspool, etc. and the 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 from Chapter 23, Subdivisions, shall be granted to permit the proposed 4-lot subdivision or subdivision application SUB 03-0087.
 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.

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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.

Furthermore, because the subject variance contains a number of significant conditions, which include no variances from the minimum roadway requirements, etc., you or your client has the right to appeal the variance decision/conditions. Therefore, in accordance with a recent charter amendment and Ordinance No. 99-111, you may appeal the director's decision and request the following:

Any person aggrieved by the decision of the director in the administration or application of this chapter, may, within thirty days after the director's decision, appeal the decision to the board of appeals.

Pursuant to Board of Appeal (BOA) Rule, PART 8. APPEALS, 8-15 General Standards for Appeals (Non-Zoning):

"A decision appealed from may be reversed or modified or remanded only if the Board finds that the decision is:

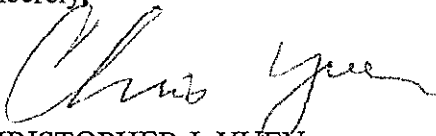
- (1) In violation of the Code or other applicable law; or
- (2) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (3) Arbitrary, or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion."

In view of the above, enclosed is form-**GENERAL PETITION FOR APPEAL OF DECISIONS BY PLANNING DIRECTOR.**

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Thank you for your patience and understanding.

Sincerely,



CHRISTOPHER J. YUEN
Planning Director

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Enclosure

xc: Manager-DWS (Ltr. only)
SUB 03-0087 (Ltr. only)
Planning Dept.-Kona (Ltr. only)