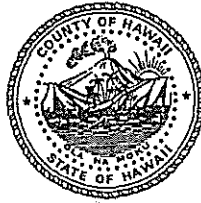


Harry Kim
Mayor



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

March 15, 2005

WES THOMAS ASSOCIATES
75-5749 Kalawa Street
Kailua-Kona, HI 96740

Gentlemen:

VARIANCE FILE NO. 1506 (DENIAL) WH (VAR 04-086)
Applicant: WES THOMAS ASSOCIATES
Owners: LOSANSKY FAMILY REVOCABLE LIVING TRUST
Request: Variance from Chapter 23, Subdivisions,
Article 6, Division 2, Improvements Required,
Section 23-84, Water Supply, (1) (2)
Tax Map Key: 8-7-010:012, (SUB 04-0115)

After reviewing the subject variance application and information submitted, the Planning Director **denies** your variance from Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-84, Water Supply, (1), to allow a proposed 14-lot subdivision of the subject TMK property without providing a water system meeting the minimum requirements of the Department of Water Supply (DWS), but **approves a variance to allow a maximum of 8 lots.**

The Planning Director has concluded that the variance from the minimum subdivision water system requirements for the proposed 14-lot subdivision be **denied** based on the following findings:

BACKGROUND

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

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1. **Location.** The subject property, consisting of approximately 108 + acres, being portion of Grant 1975 to Maele, and situated at Kukuiope 2nd, 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 applicants submitted a subdivision application (SUB 04-0115) which includes a preliminary plat map (PPM), dated June 24, 2004, proposing to subdivide subject TMK property into fourteen (14) lots. Further action on the proposed 14-lot subdivision application was deferred pursuant to letter dated July 26, 2004 in SUB 04-0115.
4. **Variance Application.** The applicants submitted the variance request and subject variance application on or about January 3, 2005 and other supplemental information.

The applicant's transmittal letter dated December 26, 2004 includes the following background information:

Page 1-2: "According to the printout of a portion of the State GIS maps of the mauka limits of the property is at the 60 inches annual line. A copy of the map is enclosed for your reference. Also shown on the composite GIS map are the rain gauge stations Kaohe, Kaohe Mauka, Opihihale 2 and Ohia Lodge. According to the records of the Hawaii State Climate Office at the University of Hawaii, the average annual rainfall for these stations are as follows:

<u>Station Name</u>	<u>Dates</u>	<u>Sta Elevation</u>	<u>Ave Rainfall</u>
Kaohe Makai	1992-93	120 ft	25 inches
Ohia Lodge	1949-?	1,322 Ft	not available
Opihihale 2	1957-2003	1,360 Ft	40.4 inches

The subject property ranges in elevation from approximately 1,220 to 1,680 ft in elevation. This elevation historically receives between 45 to 60 inches of rainfall annually. As you can see from the enclosed copy of the LandsAT photo with the tax map key overlay, the property is lush and green and is very different from the characteristics of the area surrounding the rain gauge station Opihihale 2."

Page 3:

“ALTERNATIVES

There are no reasonable alternatives in resolving the required water system requirements. To upgrade the existing County water system by the individual applicant would not be economically feasible.

An alternative would be to drill wells to create a private water system. However, due to the limited nature of this 14 lot subdivision (not serviced by the County water system), this alternative would be cost prohibitive. In addition, the area receives rain annually, which can adequately support a private water catchment system. The applicant and future lot owners can also purchase additional water, if necessary, for the private water catchment system.”

5. **Agency Comments and Requirements WH (VAR 04-086):**

- a. The Department of Water Supply (DWS) memorandum, dated February 16, 2005, states in part:

“We have reviewed the subject application; and the comments in our memorandum of August 26, 2004, still stand.

The subject property is not within the service limits of the Department’s existing water system facilities. The nearest water system facility is at the end of an existing 8-inch waterline along Mamalahoa Highway approximately 5.5 miles from the property. Further, 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.”

- b. The Hawaii County Fire Department memorandum is dated February 18, 2005. (Refer to memorandum in variance file).
- c. The State Department of Health (DOH) memorandum is dated February 25, 2005. (Refer to memorandum in variance file).

6. **Notice to Surrounding Owners.** According to the applicant's agent, a notice regarding the variance request and application was sent to list of surrounding property owner(s) attached to the variance application. Pursuant to the agent, the notice was mailed to surrounding property owner(s) on or about February 14, 2005.
7. **Comments from Surrounding Property Owners or Public.** No other agency comments were received. No written objections from the surrounding property owners or public were received.

INTENT AND PURPOSE-WATER VARIANCE

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.

Variances can be granted, but under section 23-15, no variance may be granted unless it is found that:

- (a) There are special or unusual circumstances applying to the subject property which exist either to a degree which deprives the owner or applicants 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 that property; and
- (b) There are no other reasonable alternatives that would resolve the difficulty; and
- (c) 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.

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 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 analysis of existing rainfall within the subject property utilizing maps at the Planning Department, DPW, and information provided by the applicant show there is marginal rainfall (60 inches annually) within the subject TMK property and surrounding areas to support individual or separate private rainwater catchment systems for potable and emergency uses for the proposed subdivision.

After comparing the map extracts submitted by the applicant and map-WATER-RESOURCES INVESTIGATIONS REPORT 95-4212, Active rain-gaging stations and mean annual rainfall, Plate 6, the proposed 14-lot subdivision appears to be nearest active rain-gage station "OPIHIHALI 2 24.1". The "24.1" rain gage is situated approximately 2 miles south of the TMK property and a recent 1996 publication indicates the gauge's elevation or altitude is 1270 feet. The map-Plate 6 show the "24.1" station is on or at the "60" isohyet line. The analysis of the applicant's historical rainfall information and maps purports that the subject TMK property receives between 45 to 60 inches of rainfall annually. However, recent rainfall data (2002) collected and published by the National Oceanic and Atmospheric Administration-NOAA, indicates Opihihale 2 24.1 rain gage station's 2002 annual rainfall was 38.64 inches. Furthermore, the annual "average" rainfall for "24.1" during the last 7-years 1995 thru 2002 is 32.365 inches. It appears that although the "24.1" station is on the "60" isohyet line, the actual rainfall at the "24.1" station is lower. Given that this property is mostly above the elevation of the "24.1" station, and on or above the published "60" isohyet line, the Planning Director will give the applicant the benefit of the doubt that average annual rainfall is at approximately 60 inches.

The number of lots should be limited to a maximum of 8 lots, however. Subdivision without water is clearly contrary to the intent of the Subdivision Code and is allowed to provide relief to the landowner and the value that goes with subdividing. The general practice has been to limit water variances to a small number of lots, unless there is a substantial density trade-off. Based on the foregoing, a variance to permit a proposed 8-lot subdivision of the subject TMK property 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, a variance to allow subdivision of the subject TMK property into 8 lots will not be materially detrimental to the public's welfare and will not cause substantial adverse impact to the area's character and adjoining properties.

VARIANCE DECISION-CONDITIONS

A variance to allow a maximum 8-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 applicant, 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 granting final subdivision approval of SUB 04-0115. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions for lots not serviced by a public water system 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 subdivision SUB 04-0115. 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 lots created by SUB 04-0115 not serviced by a County water system. No further subdivision of the lots created by SUB 04-0115 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
 - c. The lots created by SUB 04-0115 may not be made subject to a condominium property regime.
 - d. Any farm dwelling constructed on a lot not serviced by a County water system shall or lot created by SUB 04-0115 shall be provided with and maintain a private potable rainwater catchment system which includes a minimum 6000-gallon water storage capacity for domestic consumption or potable uses. This private rainwater 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 rainwater 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 04-0115 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 04-0115, the owner(s) of the lot(s) created by SUB 04-0115 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.

The subdivider and all grantees, successors, and assigns acknowledge that the parcel was created by a variance from the normal subdivision requirements of Hawaii 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.

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3. The subdivision's (SUB 04-0115) revised plat map and/or 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.
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.

Your variance request to approve the PPM to permit a proposed 14-lot subdivision of the subject TMK property without providing a water supply pursuant to Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-84, Water Supply, (1)(2), or providing a water system meeting the minimum requirements of the Department of Water Supply (DWS) is **denied**. As such, 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**.

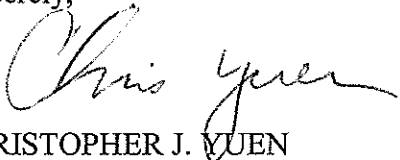
WES THOMAS ASSOCIATES

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Should you have any questions on the variance decision or the appeal procedure, please feel free to contact our Hilo office at telephone (808) 961-8288.

Sincerely,



CHRISTOPHER J. YUEN
Planning Director

WRY/CJY:cd

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Enclosure

xc: Manager-DWS
Planning Dept.-Kona
SUB 04-0115