

County of Hawai'i

BOARD OF APPEALS

Aupuni Center • 101 Pauahi, Suite 3 • Hilo, Hawai'i 96720
(808) 961-8288 • Fax (808) 961-8742

CERTIFIED MAIL

7004 2510 0003 5891 2513

September 13, 2006

Ms. Dvorah Henderson
83-5469 Middle Keei Road
Captain Cook, HI 96704

Dear Ms. Henderson:

Board of Appeals (BOA 06-000028)

Petitioner: Dvorah Henderson

Request: Appeal of Decision by the Planning Director dated May 12, 2006
relating to the Denial of Variance Application (VAR 05-092) relating
to water supply requirements of Chapter 23, Subdivision Control Code

Tax Map Key: (3) 8-7-13:49, Kolo and Olelomoana 1st, Kona, Hawai'i

Attached is a certified copy of the Findings of Fact, Conclusions of Law, and Decision and Order adopted by the Board of Appeals at its meeting of September 8, 2006, for the above-referenced petition.

Should you have any questions in the meantime, please feel free to contact Alice Kawaha or Susan Gagorik of the Planning Department, who serves as staff to the Board, at 961-8288.

Sincerely,



Valta A. Cook, Chairman

Board of Appeals

Att.

xc: Board of Appeals
Corporation Counsel, BOA Attorney
Corporation Counsel, Planning Department Attorney
Planning Director
Ministerial Division – Mr. Daryn Arai
Planning Department – West Hawaii Office

SEP 13 2006

BEFORE THE BOARD OF APPEALS

COUNTY OF HAWAI'I

In re the Appeal of

DVORAH HENDERSON,

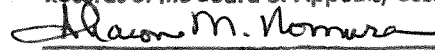
from the Decision by the Planning Director dated May 12, 2006 relating to the Denial of Variance Application (VAR 05-092) relating to water supply requirements of Chapter 23, Subdivision Code, Kolo and Olelomoana 1st, Kona, Hawai'i, TMK: (3) 8-7-13:49,

Appellant.

BOA No. 06-000028

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION, AND ORDER

I hereby certify that this is a true copy from the Records of the Board of Appeals, County of Hawaii



Custodian of Records, Board of Appeals,
County of Hawaii

Date: SEP 13 2006

s:\b&c\boa\henderson\ FOF COL

FINDINGS OF FACT, CONCLUSIONS OF LAW AND
DECISION, AND ORDER

The Board of Appeals of the County of Hawai'i (hereinafter, "the Board") considered this appeal from the Planning Director's Denial of the Application for Variance from Subdivision Code dated May 12, 2006 at a duly noticed hearing on July 14, 2006. Appellant Dvorah Henderson appeared on her own behalf, assisted by Sunny Langstraap, and Amy G. Self, Deputy Corporation Counsel, appeared on behalf on Christopher J. Yuen, Planning Director.

The Board has reviewed the files and records on this matter, considered the testimony given at the hearing, as well as the arguments of the parties through their representatives, and based on the foregoing and the entire record in these proceedings, makes the following Findings of Fact, Conclusions of Law and Decision and Order in BOA No. 06-000028, regarding Water Variance No. 05-092 filed by Applicant Dvorah Henderson on behalf of Lloyd Ligvani, owner.

BEFORE THE BOARD OF APPEALS

COUNTY OF HAWAI'I

In re the Appeal of

DVORAH HENDERSON,

from the Decision by the Planning Director dated May 12, 2006 relating to the Denial of Variance Application (VAR 05-092) relating to water supply requirements of Chapter 23, Subdivision Code, Kolo and Olelomoana 1st, Kona, Hawai'i, TMK: (3) 8-7-13:49,

Appellant.

BOA No. 06-000028

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION, AND ORDER

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION, AND ORDER

The Board of Appeals of the County of Hawai'i (hereinafter, "the Board") considered this appeal from the Planning Director's Denial of the Application for Variance from Subdivision Code dated May 12, 2006 at a duly noticed hearing on July 14, 2006. Appellant Dvorah Henderson appeared on her own behalf, assisted by Sunny Langstraap, and Amy G. Self, Deputy Corporation Counsel, appeared on behalf on Christopher J. Yuen, Planning Director.

The Board has reviewed the files and records on this matter, considered the testimony given at the hearing, as well as the arguments of the parties through their representatives, and based on the foregoing and the entire record in these proceedings, makes the following Findings of Fact, Conclusions of Law and Decision and Order in BOA No. 06-000028, regarding Water Variance No. 05-092 filed by Applicant Dvorah Henderson on behalf of Lloyd Ligvani, owner.

FINDINGS OF FACT

1. This is an appeal filed by Dvorah Henderson (hereinafter, “Appellant”) from the Planning Director’s (hereinafter, “Director”) Denial of Application for Variance from the Subdivision Code dated May 12, 2006.
2. The property is a 13.133 acre lot (hereinafter, “Property”) located in Kolo Subdivision, being consolidation and subdivision of Grant 3607, Grant 3601 and portions of Grant 2996 and Grant 3396 in the Lands of Kolo and Olelomoana 1st, and situated at South Kona, Hawai‘i.
3. The Property is identified by Tax Map Key (3) 8-7-013:49.
4. The Property is zoned agricultural A-5a.
5. The fee owner of the Property is Lloyd Ligvani.
6. The owner of the Property filed a subdivision application (05-000192) proposing the subdivision of the subject Property into two (2) lots.
7. The Appellant submitted a variance request on September 27, 2005 with other materials submitted on April 25, 2006.
8. The variance application (VAR 05-092) requested a variance from Chapter 23, Article 6, Division 2, Section 23-84 of the Hawai‘i County Code (hereinafter, “HCC”), to allow a proposed 2-lot subdivision without providing a water system meeting the minimum requirements of the Department of Water Supply, as required by the HCC.
9. By letter dated May 12, 2006, the Director denied the variance from the minimum subdivision water system requirements.
10. Appellant filed an Appeal from the Director’s Decision on May 26, 2006.
11. Said appeal was timely filed.

12. The owner proposes to subdivide the Property into two (2) lots of approximately equal size.

13. The Property currently has a dwelling with a 50,000 gallon catchment water tank with a 4-inch fire hose attachment on it.

14. There is a 5-acre macadamia nut orchard on the Property below the existing dwelling.

15. The Appellant plans to construct another dwelling on the Property.

16. Appellant plans to build another catchment area for another 50,000 gallon tank near the existing 50,000 gallon tank.

17. The HCC relating to the Subdivision Code provides:

Section 23-84 Water Supply.

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.

18. Section 23-15 of the Subdivision Code, "Grounds for Variances" provides:

No variance will be granted unless it is found that:

(a) There are special or unusual circumstances applying to the subject real property which exist either to a degree which deprives the owner or applicant 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 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 welfare or cause substantial, adverse impact to our area's character or to adjoining properties.

19. Section 6-10.2 of the Hawai‘i County Charter authorized the Board of Appeals to hear and determine appeals from final decisions of the Planning Director. Section 23-5 of the Subdivision Code provides for appeals of actions by the Planning Director under the Subdivision Code to the Board of Appeals and Section 8-15 of the Board of Appeals Rules of Practice and Procedure provides that the Board of Appeals may reverse, modify, or remand the Director’s decision in this case if it 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.

20. The Director denied the variance stating that the water supply would be inadequate.

21. The Director found that existing rainfall in the area is inadequate to support individual or separate private rain water catchment systems for potable and emergency uses for the proposed subdivisions.

22. The Director used rainfall data from the rain-gauge station “OPIHIHALE NO. 2,” located approximately 1.45 miles south of the subject Property.

23. The elevation of OPIHIHALE NO. 2 is 1,270 feet.

24. The proposed subdivision is makai of the Hawai‘i Belt Highway and its elevation is between 720 and 1,200 feet.

25. The Director also used rainfall data from the Hawai‘i State Climate Office indicating the annual rainfall to be 41.20 mean inches.

26. The Director found that the annual rainfall in the area is 38.64 inches.

27. The Director found that the annual rainfall to the Property is probably less than OPIHIHALE NO. 2 or 24.1 mean annual average because rainfall decreases for properties makai of the Hawai'i Belt Highway.

28. Appellant testified that there was adequate rainfall on the property, more than indicated at the OPIHIHALE No. 2 gauge.

29. The 50,000 gallon water tank has served the property for 40 years without going dry.

30. Appellant intends to install an additional 50,000 gallon water tank.

31. Appellant submitted evidence that there is 59.055 inches of rainfall in the area.

32. Photographs of the Property showed that there is lush vegetation on the Property, compared to vegetation at the OPIHIHALE NO. 2 gauge, which indicates that there is greater rainfall on the Property than at the OPIHIHALE NO. 2 gauge.

CONCLUSIONS OF LAW

1. The Planning Director has jurisdiction to render a decision on the variance application pursuant to Article V, Chapter 4, Section 6-10.2 of the Hawai'i County Charter and Chapter 23 of the HCC.

2. The Board has jurisdiction to issue a decision on this appeal pursuant to the Board of Appeals Rules of Practice and Procedures.

3. The Board may reverse, modify or remand a decision of the Planning Director upon finding that the decision is: (1) in violation of the County code or other application law, or (2) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

4. Based upon the Director's letter denying the variance, the decision was based upon a finding that the rainfall in the area is too low for private individual catchment systems.

5. HCC Chapter 23 contemplates that the Director will conduct a particularized assessment of whether the application meets the criteria for a variance. In the case of an application for water variance, the assessment should include consideration of several factors including but not limited to the average annual rainfall at the site, the particulars of the proposed catchment system, the proposed uses of the property, and other factors.

6. The denial of May 12, 2006, is clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record.

7. The Director's decision of May 12, 2006 denying the variance application is arbitrary, capricious, and based on abuse of or unwarranted exercise of discretion. The Director's reliance on the single factor of the rain means annual rainfall is arbitrary or capricious.

8. The Appellant has met all of the grounds for the issuance of the variance in compliance with Section 23-15 of the Subdivision Code, and have demonstrated that:

(1) there are special or unusual circumstances applying to the subject real property which exists either to a degree which deprives the owner or applicant of substantial property rights that would otherwise be available or to a degree that obviously interferes with the best use or manner of development of that property; (2) there are no other reasonable alternatives that would resolve the difficulty; and (3) the variance will be consistent with the general purpose of the zoning district, the intent and purpose of the Subdivision Code and the County General Plan, and will not be materially detrimental to the public welfare or cause substantial, adverse impact to the area's character or to adjoining properties.

9. The Board hereby finds and concludes that the May 12, 2006 decision of the Director denying Appellant's water Variance Application (VAR 05-092) constituted an action which was:


- a. In violation of HCC Chapter 23, HRS Chapter 91, and/or other applicable law;
- b. Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; and/or
- c. Arbitrary or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

10. If it is determined that any of the Findings of Fact should have been set forth as Conclusions of Law, or the converse, they shall be deemed as such. All remaining proposed Findings of Fact, Conclusions of Law, and/or Exceptions thereto submitted by all parties which have not heretofore been adopted, are specifically rejected and not made apart of this Decision and Order.

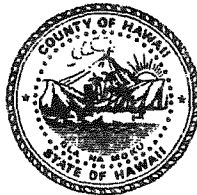
DECISION AND ORDER

Pursuant to the vote at the meeting of the Board on July 14, 2006, the Board hereby orders and modifies the Director's decision to deny the Appellant's water Variance Application (VAR 05-092) and hereby approves the water variance for the two (2) proposed lots.

Dated: Hilo, Hawai'i, Sept. 12, 2006


VALTA A. COOK, Chair
Board of Appeals of the County of Hawai'i

Harry Kim
Mayor



Christopher J. Yuen
Director

Brad Kurokawa, ASLA
LEED® AP
Deputy Director

County of Hawaii

PLANNING DEPARTMENT

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

May 12, 2006

Ms. Dvorah Henderson
83-5469 Middle Keei Road
Captain Cook, HI 96704

Dear Ms. Henderson:

VARIANCE APPLICATION-VAR 05-092 (DENIAL)

Applicant: DVORAH HENDERSON

Owner: LLOYD LIGVANI

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

Tax Map Key: 8-7-013:049, (SUB 05-000192)

After reviewing the subject variance application and information submitted, the Planning Director denies your Variance Application-VAR 05-092 from Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-84, Water Supply, (1), to allow a proposed 2-lot subdivision of the subject TMK property without providing a water system meeting the minimum requirements of the Department of Water Supply (DWS).

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

BACKGROUND

1. **Location.** The subject TMK property, Lot 23 containing approximately 13.133 acres, in "Kolo Subdivision", being consolidation and subdivision of Grant 3607, Grant 3601 and portions of Grant 2996 and Grant 3396 in the Lands of Kolo and Oelolomoana 1st, and situated at South Kona, Hawaii.

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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 owner or subdivider filed a subdivision application (05-000192) proposing to subdivide the subject TMK property into 2-lots. The proposed subdivision application (SUB 05-000192) was filed on September 27, 2005. This application's preliminary plat map (PPM) dated September 14, 2005 proposes to subdivide subject TMK property into 2-lots. Pursuant to a letter dated December 28, 2005 in the subdivision file, further action on the subdivision is being deferred.
4. **Variance Application.** The (applicant/owner/agent) submitted the variance request and subject variance application on or about September 27, 2005 and other information/submittals were received on or about April 25, 2006.

The applicant's original background report states in part the following:

"We are aware that there is NO (sic) County water provided to this property."

"We propose, as part of the subdivision plan to divide this property into 2 lots, to provide an additional fifty thousand gallon catchment tank and water collection system at the top of the property, next to the existing 50,000 gallon water catchment system, to provide water to the new lower subdivided parcel."

In addition to the above, the applicant's forwarded additional information, photographs, maps, etc. with a letter dated April 24, 2006.

5. **Agency Comments and Requirements-VAR 05-092:**
 - a. The State Department of Health (DOH) memorandum is dated April 13, 2006. (Refer to memorandum in variance file).
 - b. The County of Hawaii Fire Department memorandum is dated April 19, 2006. (Refer to memorandum in variance file).
 - c. The Department of Water Supply (DWS) memorandum, dated April 25, 2006 states in part:

Ms. Dvorah Henderson
Page 3
May 12, 2006

“We have reviewed the subject Variance application and our comments from our memorandum of January 5, 2006, still stand.

Please be informed that the subject parcel is not within the service limits of the Department's existing water system facilities. The nearest Department of Water Supply water system facility is at the end of an existing 8-inch waterline within the Mamalahoa Highway, approximately 3.35 miles from the property.” (Note: Refer to earlier DWS memorandum dated January 5, 2006 in the subdivision file).

6. **Notice to Surrounding Property Owners.** The applicant forwarded a transmittal letter dated April 24, 2006 and other submittals indicating a notice regarding the variance application was mailed to a list of surrounding property owner(s). According to the notarized affidavits, it appears that a notice of variance was mailed to surrounding property owner(s) and a sign was posted on subject property on March 24, 2006, respectively, by the applicant. The notice of was published in the Hawaii Tribune Herald and West Hawaii Today on or about April 12, 2006.
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. The following letter endorsing the proposed variance was received:

7a. Letter from Richard Sasaki dated April 26, 2006.

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 interfere with the best use or manner of development of that property; and

Ms. Dvorah Henderson

Page 4

May 12, 2006

- (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 proposed variance would not fulfill the intent of the Subdivision Code in that the water supply would be inadequate.

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 applicants show that there is inadequate 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 subdivision.

After comparing the information submitted by the applicant, and reviewing a map-WATER-RESOURCES INVESTIGATIONS REPORT 95-4212, PLATE 6, location of active rain-gauges nearest the proposed subdivisions, and other data published by the Hawaii State Climate Office (HSCO), it appears that the proposed subdivision is closest to active rain-gauge station "OPIHIHALE NO. 2". The "2" rain gauge is situated approximately 1.45 miles (south) of the TMK property. According to a 1996 publication by the U.S. Geological Survey, Opihihale No. 2's elevation or altitude is 1270 feet. The proposed subdivision is "makai" of the Hawaii Belt Highway and the subject property's elevation is between approximately 720 feet to 1200 feet. The map-PLATE 6 and recent information submitted by the applicant clearly shows subject TMK property is "makai" of the Hawaii Belt Highway and below the "60" isohyet line. The applicant's recent submittals says "We have "unofficial" information that the rainfall on the subject property exceeded more than 100 inches last year and exceeded 75 inches in 2004". However, the "mean" annual rainfall data published by the HSCO for "2" between years 1956-2000 is 41.20 "mean" inches. Recent NOAA rainfall data indicates "OPIHIHALE 2 "24.1" received 38.64 inches of rainfall during 2002.

Ms. Dvorah Henderson
Page 5
May 12, 2006

Therefore, current annual rainfall within proposed subdivision is probably less than “2” or “24.1” mean annual averages; because rainfall decreases for property “makai” of the Hawaii Belt Highway. The comparison between the applicant’s data and historical “mean” rainfall data maintained by HSCO and NOAA demonstrates that rainfall within the subject TMK property or surrounding areas “makai” of the Hawaii Belt Highway is low for private individual water catchment systems.

The alternative to a water system proposed by the applicants--rain catchment by the individual lot owner--would not meet the intent and purpose of the Subdivision Code: in this case, that a subdivision have adequate, clean safe drinking water for human consumption, and a reliable supply of water for firefighting purposes. The rainfall is too low and too unreliable to support a catchment system. The Subdivision Code, by specifying the need for a water system, represents a policy decision that subdivisions should have on-site water and not rely on hauling in water. As for fire protection, although a variance could include a condition that the lot owner have a second tank for fire fighting purposes, and keep it filled. This condition would be impossible to monitor and if it were breached, the violation would likely be discovered at the worst possible moment, for example; when a fire truck actually tried to get water from the tank. The proposed 2-lot subdivisions could, therefore, be detrimental to the public welfare.

Approval of the subject variance(s) from water supply requirements would not conform to the following goals, policies and standards of the Hawaii County General Plan which state 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 county shall encourage the development and maintenance of communities meeting the needs of its residents in balance with the physical and social environment.

The proposed variance would only add more lots to an existing subdivision with substandard infrastructure. Your variance request to allow or develop a proposed 2-lot subdivision 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**.

In accordance with a recent charter amendment and Ordinance No. 99-111, you may appeal the director’s decision and request the following:

Ms. Dvorah Henderson
Page 6
May 12, 2006

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.**

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 L. YUEN
Planning Director

WRY/CJY:cd

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Enclosure

xc: Manager-DWS
SUB 05-000192