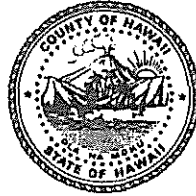


Harry Kim  
Mayor



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

October 19, 2006

Mr. Michael A. Ferrington, Esq.  
78-6800 Alii Drive, Unit No. 199  
Kailua-Kona, HI 96740

Dear Mr. Ferrington:

**VARIANCE-VAR 06-037-DENIAL**

**Applicant:** MICHAEL A. FERRINGTON, ESQ.  
**Owner:** MICHAEL A. FERRINGTON, ESQ.  
**Request:** Variance from Chapter 23, Subdivisions,  
Article 6, Division 2, Improvements Required,  
Section 23-84, Water Supply, (1)(2)  
**Tax Map Key:** 8-8-016:020, (SUB 05-000237)

After reviewing your variance application, the Planning Director denies your variance request to allow proposed 2-lot subdivision (SUB 05-000237) without a water system meeting the minimum requirements of the County Department of Water Supply (DWS). The variance is from Hawaii County Code, Chapter 23, Subdivisions, Division 2, Improvements Required, Section 23-84, Water Supply, (1)(2).

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 1 containing approximately 10.841 acres, being a portion of Grant 3723 to J. M. Monsarrat, is situated at Papa 2<sup>nd</sup>, 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 subdivider/owner filed a subdivision application (SUB 05-000237) and preliminary plat map (PPM) on December 5, 2005 proposing to subdivide the subject TMK property into 2-lots. Further actions on SUB 05-000237 is being deferred pursuant to a letter dated March 10, 2006 in the subdivision file.
4. **Variance Application.** The (applicant/owner) submitted the variance request and subject variance application on or about on May 1, 2006.

The applicant's original reasons and background information dated May 1, 2006 states in part the following:

Page 1- "The reason for the variance request is the lack of available County water as the only County water line ends over 8 miles from the property; this interferes with the best use and manner of the property which is by having two 5 acre parcels (as consistent with the 5 acre Ag zoning) and deprives the applicant with substantial property rights by preventing the applicant of being able to split his parcel as he would otherwise be able to do."

5. **Agency Comments and Requirements-VAR 06-037:**

- a. The State Department of Health (DOH) memorandum is dated May 16, 2006. (Refer to DOH memorandum in variance file).
- b. The County of Hawaii Fire Department memorandum is dated May 23, 2006. (Refer to HFD memorandum in variance file).
- c. The Department of Water Supply (DWS) memorandum, dated May 31, 2006 states in part:

"We have reviewed the subject variance application and our comments from our memorandum of January 31, 2006, to you still stand.

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 10 miles from the property."

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6. **Notice to Surrounding Property Owners.** The applicant forwarded a transmittal letter dated May 23, 2006 and other attachments regarding notice sent to a list of surrounding property owner(s). According to the affixed postal receipts, it appears that the notice was mailed to surrounding property owner(s) on or about May 17, 2006. The notice of was published in the Hawaii Tribune Herald and West Hawaii Today on or about May 18, 2006.

**Posted Sign.** The applicant forwarded a transmittal letter dated July 5, 2006, copy of an affidavit, and other submittals regarding the required sign. It appears that the required sign was posted at the property on or about May 10, 2006.

7. **Comments from Surrounding Property Owners or Public.** No other agency comments were received. The following objection letter was received:

- 7a. Letter from Amber Namaka Whitehead, Et al. (4 signatures) dated June 9, 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
- (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.

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The proposed variance would not fulfill the intent of the Subdivision Code in that the water supply would be inadequate. As more fully discussed below, the rainfall at the subject site is less than the 60" annual average rainfall required by Planning Department Rule 22-4 for variances where the water supply is based on rain catchment. The proposed subdivision also does not qualify under any of the exceptions in Planning Department Rule 22-6. Besides being a rule having the force and effect of law, Rule 22 is a statement of specific criteria to evaluate applications for variances from the water supply requirement, and provides public notice of these criteria.

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, denoting the locations of active rain-gauges and other data published by the Hawaii State Climate Office (HSCO), it appears that the proposed subdivision's elevation is closest to active rain-gauge station "OPIHIHALE NO. 2". The "2" rain gauge is situated approximately 4 + miles (north) 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 "mean" annual rainfall data published by the HSCO for "2" between years 1956-2000 is 41.20 "mean" inches; and, recent NOAA rainfall data indicates "OPIHIHALE 2 "24.1" received 38.64 inches of rainfall during 2002. The proposed subdivision is "makai" of the Hawaii Belt Highway and the subject property's elevation is between approximately 1240 feet to 1280 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 the USGS rainfall map indicates that the 60" isohyet is approximately 2000 feet "mauka" of this property and that rainfall generally decrease as one goes "makai".

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.

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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 historical rainfall for this area is too low and too unreliable to support a catchment system.

The annual 38.64 inches of rainfall +/- within the subject property **does not** meet Rule No. 22-Water Variance.

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:

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.

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

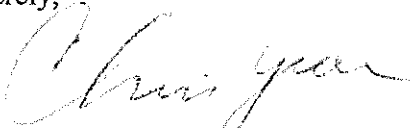
"A decision appealed from may be reversed or modified or remanded only if the Board finds that the decision is:

- (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 J. YUEN  
Planning Director

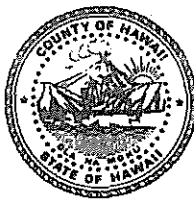
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Enclosure

xc: Manager-DWS  
SUB05-000237  
Amber Namaka Whitehead, Et al.  
Christine Johansen, et al.

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 17, 2007

Mr. Michael A. Ferrington, Esq.  
c/o 100 Second Street East  
Whitefish, MT 59937

Dear Mr. Ferrington:

**VARIANCE PERMIT-VAR 06-037 (APPROVAL)**

**Applicant:** MICHAEL A. FERRINGTON, ESQ.

**Owner:** MICHAEL A. FERRINGTON, ESQ.

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

**Tax Map Key: 8-8-016:020, (SUB 05-000237), (BOA 06-000034)**

Pursuant to BOA 06-000034, Findings of Facts, Conclusions of Law, and Decision and Order, dated March 19, 2007, the Planning Director certifies **approval** of variance application (VAR 06-037) subject to variance conditions. The variance allows proposed 2-lot subdivision (SUB 05-000237) to be created without a water system meeting the minimum requirements of the County Department of Water Supply (DWS). The variance is from Hawaii County Code, Chapter 23, Subdivisions, Division 2, Improvements Required, Section 23-84, Water Supply, (1)(2).

The variance from the minimum subdivision water system requirements is **approved** based on the following findings:

**BACKGROUND**

1. **Location.** The subject TMK property, Lot 1 containing approximately 10.841 acres, being a portion of Grant 3723 to J. M. Monsarrat, is situated at Papa 2<sup>nd</sup>, 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).

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3. **Subdivision Request/PPM.** The subdivider/owner filed a subdivision application (SUB 05-000237) and preliminary plat map (PPM) on December 5, 2005 proposing to subdivide the subject TMK property into 2-lots. Further action on SUB 05-000237 was deferred pursuant to a letter dated March 10, 2006 in the subdivision file.
4. **Variance Application (VAR 06-037).** The (applicant/owner) submitted the subject variance application (VAR 06-037) on or about on May 1, 2006. On October 19, 2006, the Planning Director **denied** VAR 06-037.
5. **BOA 06-000034.** The applicant/owner/petitioner-Michael A. Ferrington appealed the Planning Director's decision dated October 19, 2006 to deny VAR 06-037 to the County of Hawaii-Board of Appeals. The copy of the Findings of Facts, Conclusions of Law, and Decision and Order, dated March 19, 2007 in the subject Variance Application (VAR 06-037) file states in part:

**"FINDING OF FACT"**

"The Appellant's own log and rain gauge data showed in excess of 60" of rainfall (Appellant's Exhibit F)."

**"DECISION AND ORDER"**

Based on the foregoing Findings of Facts and Conclusions of Law, it is hereby ordered that the appeal of the decision by the Planning Director dated October 19, 2006, denying the variance request (VAR 06-037) relating to minimum water supply requirements of Chapter 23, Subdivision Code, is granted on the ground that the Planning Director's decision was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The Board declined to rule on whether the 45 day implied approval of preliminary plat provision of Section 23-62, Hawaii Count (sic) Code is applicable."

**VAR 06-037-VARIANCE CONDITIONS**

In view of Findings of Facts, Conclusions of Law, and Decision and Order, dated March 19, 2007, variance to permit proposed 2-lot subdivision without a water system meeting the minimum requirements of the County Department of Water Supply (DWS) is approved subject to the following conditions:



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1. The owner(s), successors and assigns shall be responsible for complying with the stated conditions of approval.
2. The owner(s), successors and assigns shall file a written agreement with the Planning Department no later than one year from the issuance of tentative subdivision approval, and before receipt of final subdivision approval. The following agreement shall contain the following deed covenants, listed below as and shall be recorded in the Bureau of Conveyances by the Planning Department, at the applicant's cost.
  - 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 05-000237. 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 05-000237 not serviced by a County water system. No further subdivision of the lots created by SUB 05-000237 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
  - c. The lots created by SUB 05-000237 may not be made subject to a condominium property regime.
  - d. Any farm dwelling constructed on a lot created by SUB 05-000237 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.

Mr. Michael A. Ferrington, Esq.

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- 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 05-000237 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 05-000237, the owner(s) of the lot(s) created by SUB 05-000237 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.
- 3. The subdivision application's final plat map shall meet all the requirements of the Hawaii County Zoning Code and the Subdivision Code not covered by this variance.
  - 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.

Mr. Michael A. Ferrington, Esq.

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May 17, 2007

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

Sincerely,



CHRISTOPHER J. YUEN

Planning Director

WRY/DSA:cd

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xc:     Manager-DWS  
          SUB 05-000237  
          Amber Namaka Whitehead, Et al.  
          Christine Johansen  
          BOA 06-000034