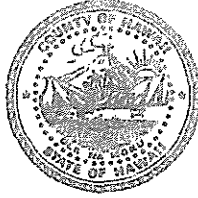


Harry Kim
Mayor



Christopher J. Yuen
Director

Brad Kurokawa, ASLA
LEED® AP
Deputy Director

County of Hawaii
PLANNING DEPARTMENT

101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720-4224
(808) 961-8288 • FAX (808) 961-8742

September 14, 2007

Mr. Jack and Ms. Jane Furtado
P.O. Box 1104
Kurtistown, HI 96760

Dear Mr. and Ms. Furtado:

VARIANCE-VAR 06-081 (DENIAL)

Applicants: JACK FURTADO, ET AL.

Owners: JACK FURTADO, ET AL.

**Request: Variance from Chapter 23, Subdivisions,
Improvements Required,**

Tax Map Key: 1-7-017:145, (SUB 06-000406)

After reviewing your variance application, previous SUB 7923 file, and comments received from surrounding property owners, the Planning Director denies your variance application. The applicant, on behalf of the owners requested variance from the minimum water supply for and road improvements required by Chapter 23, Subdivisions, Division 2, Improvements Required, Section 23-84, Water Supply (1)(2), Section 23-87, Standard for nondedicable street; escrow maintenance fund, and Section 23-95, Right-of-way improvement to permit proposed subdivision of the subject property created by SUB 7923.

After considering the circumstances requested to approve SUB 7923 and allow the creation of the subject property containing an area of 40 + acres, the Planning Director has concluded that variances from the minimum water supply and road requirements from Chapter 23, Subdivisions, to permit further subdivision of the property should be **denied**. The subject lot of 40.001 acres resulted from a consolidation/resubdivision of a property (74.872 acres) containing 3 lots. This prior subdivision (SUB 7923) increased the size of the subject TMK property to 40.001 acres. To allow further subdivision of this 40.001 acres would result in 4 lots being created on the 74 + acres on the 74 acre area, which would violate the Zoning Code. Because this area has a zoning of A-20a, only three (3) lots could be created within the 74 acre area.

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The **denial** is based on the following findings:

BACKGROUND

1. **Location.** The referenced TMK property, "LOT 88-A-1" containing approximately 40.001 acres, being part of Keaau Tract and being portion of R. P. 7223 and L. C. Aw. 8559-B, Apana 16, is situated at Keaau, Puna, Hawaii.
2. **Zoning.** The subject property is zoned Agricultural (A-20a) by the County and designated Agriculture "A" by the State Land Use Commission (LUC).

The subject TMK property or "LOT 88-A-1", including created by SUB 7923 on December 14, 2005 pursuant to subdivision application's revised Final Plat Map dated December 13, 2005 in SUB 7923.

3. **Subdivision Request/PPM.** Subsequent to the approval of SUB 7923 in 2005, the applicant-owners of Lot 88-A-1 filed subdivision application (SUB 06-000406) to further subdivide Lot 88-A-1 (created by SUB 7923) into 2-lots. The preliminary plat map (PPM-SUB 06-000406) proposes to subdivide Lot 88-A-1 into 2-lots each containing a minimum of 20 acres. Further action on this subdivision application was deferred pursuant to letter dated September 5, 2007 in the subdivision file.
4. **Variance Application.** The applicant-owners submitted the original variance application on October 16, 2006 and further information regarding cost estimates to install proposed roadway fronting the property on June 5, 2007. The applicants granted the Planning Director a time extension to evaluate the information submitted to complete the variance application and requested additional time to send notice to surrounding property owners and render a decision on the subject variance application to September 15, 2007.

The applicant's original variance application and submittals were received on October 16, 2006 requesting variances from the water supply and road improvements required by Chapter 23, Subdivisions and other requested information to complete the variance application on June 5, 2007. The variance application was acknowledged by letter dated June 28, 2007. Subsequent to acknowledging the variance application, the applicant's requested additional time to submit an amended list of surrounding property owners and mail notice to surrounding property owners; and, in addition granted the Planning Director and granted the Planning Director an extension of time to September 15, 2007 to render a decision on the subject variance application pursuant to letter dated August 9, 2007. The Planning Director received several objection letters from surrounding property owners which included questions regarding the circumstance and nature of the previous subdivision creating the subject TMK property containing 40 + acres from an aggregate area of 74 + acres zoned A-20a. These written objections letters requested the Planning Director to review the circumstances and standards applied to SUB 7923 under Chapter 23, Subdivisions requested by the previous owners under Section 23-7, which resulted in the consolidation and resubdivision of 3 lots into 3 revised lots including the subject TMK property containing more than 40 + acres and 2 other lots. (Refer to a objection letter, chronology of SUB 7923 cited below, and determination and reasons by the Planning Director to deny the applicant's request for variance to permit proposed 2-lot subdivision of the subject TMK property cited below).

5. **Agency Comments and Requirements-VAR 06-081:**

- a. The State Department of Health (DOH) memorandum dated July 2, 2007 states:

"There are no additional concerns to those made previously."
- b. The County of Hawaii Fire Department memorandum, dated July 6, 2007 states:

"In that the catchment system will also be used for fire protection, it is recommended that the fire department connection to the tank be located in an area accessible by fire apparatus with approved fire connection."
- c. The Department of Water Supply (DWS) memorandum, dated July 9, 2007 states in part:

"We have reviewed the subject application for the proposed subdivision.

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."

6. **Notice to Surrounding Property Owners/Public Notice.** The applicants forwarded a notification list and other attachments regarding a notice dated July 22, 2007 was mailed to a list of surrounding property owners on July 30, 2007 and fax letter-explanation dated August 2, 2007; and, submitted a transmittal letter dated August 9, 2007, amended notification list, and copy of notice sent to the amended notification list, and proof of mailing on August 9, 2007. According to the certificate of mailings received from the applicants, notice of the variance were sent by US mail to surrounding property owners including the Road Association on July 30, 2007 and/or August 9, 2007. The public notice was published in the Hawaii Tribune Herald and West Hawaii Today on July 6, 2007.

Posted Sign. The applicant submitted an affidavit dated August 10, 2007 regarding a posted sign regarding the variance application and photographs of the sign posted on the subject TMK property. Note: It appears that the applicants or subdividers have not filed any affidavit regarding a sign or photographs of a sign required by letter dated September 5, 2006 in the subdivision file (SUB 06-000406).

7. **Comments from Surrounding Property Owners or Public.** No other agency comments were received. Subsequent to receiving the amended notice sent on August 9, 2007 by the applicant, the following objections letters and comments from the surrounding property owners or public (others) were received:
 - 7a. Objection letters (Fax) from Leonard and Lynn Kubousek received on August 24, 2007. Letter (Hard Copy-Corrected) received on September 5, 2007.
 - 7b. Objection letter from James H. Cobb received on August 24, 2007.
 - 7c. Objection letter from Carrie B. Mospens Cobb received on August 24, 2007.

- 7d. Objection letter from Don Shaw dated August 23, 2007 received on August 27, 2007. Copy of E-mail and questions from Don Shaw AIA and Janice Friend, M.D. received August 29, 2007.
- 7e. Objection letter from James H. Cobb/Don Shaw received on August 29, 2007. This letter states in part:

“History

- * Subdivision No. 7739. In 2002, the Applicants obtained approval to subdivide a 74.8 acre parcel into 3 lots-Lot 88-A 34.872 acres, Lot 86-B 20.00 acres. He also was granted a road and water variance.
- * Subdivision No. 7923. In 2005, Applicants obtained approval to consolidate and resubdivide the three lots into 3 new lots- Lot 88-A-1 40.01 acres, Lot 86-B-1 24.313 acres, and Lot 86-B-2 10,558 acres. The zoning for the property is Ag 20, so Lot 86-B-2 does not technically comply with the subdivision and zoning code, although it is understood the subdivision and zoning codes do not apply to consolidation/resubdivision under code section 23-7 and 25-11.

Present Application (Sub 06-0406)

The present subdivision application seeks the subdivision of Lot 88-A-1 into two lots, one 20.01 acres and one 20.00 acres. The applicants also seek a road and water variance.

Position

We oppose both the variance application as being inconsistent with the general purposes of the zoning district, the intent and purpose of the subdivision code and the general plan, and because it will be materially detrimental to the public welfare and cause substantial, adverse impact to an area's character and to adjoining properties. Section 23-14 (c).

It is understood that in a consolidation/resubdivision, under Section 25-2-11 the Planning Director may waive the requirements of the zoning code. However, a landowner should not be allowed to consolidate and resubdivide his property with the intent to subsequently utilize one of those lots to create an additional lot which would not ordinarily be allowed.

The Applicants originally had one 74 acre lot. Under Ag 20 they are permitted to create 3 lots. However, by manipulating the provisions in the code regarding consolidation/resubdivision, they are now seeking to be permitted 4 lots. This is inconsistent with and contrary to the intent and purpose of the zoning and subdivision codes, and therefore the variance application should be denied."

INTENT AND PURPOSE-WATER/ROADWAY VARIANCE

Chapter 23, Subdivisions requires new subdivisions to have a water system meeting the minimum requirements of the County-DWS and road improvements meeting with the standard specifications of the County-DPW. A variance from Chapter 23, Subdivisions or variances from the minimum water system and roadway requirements to permit further subdivision of "LOT 88-A-1" containing 40 + acres which was permitted to be part of a 3-lot consolidation/resubdivision action permitted under Section 23-7, Applicability to consolidation or resubdivision action. Section 23-7 states in part the following:

-- "The requirements and standards of this chapter shall not apply to consolidation and resubdivision action resulting in the creation of the same or fewer number of lots than that which existed prior to consolidation/resubdivision action."

SUB 7923 was approved pursuant to Section 23-7; and the Planning Director reviewed the Tentative Approval (TA) letter dated September 7, 2004 approving the preliminary plat map (PPM) dated July 14, 2004 in SUB 7923. The PPM permits consolidation/resubdivision of the original 3-lots into the following lots: "LOT 88-A-1 20.00 Acres", "LOT 86-A-1 25.876 Acres", and LOT 86-B-1 28.996 Acres". Final subdivision approval was granted to SUB 7923 on February 18, 2005 and revised final plat map dated December 23, 2004 creating the following lots: "LOT 88-A-1 20.000 Acres", "LOT 86-B 24.313 Acres", and "LOT 86-A-1 30.559 Acres".

Subsequent to granting final approval to SUB 7923 and final plat map dated December 23, 2004, the applicant's surveyor submitted transmittal letter dated October 10, 2005, which states in part:

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"On behalf of Jack Furtado, I am submitting Revised Subdivision Maps for Subdivision 2002-0114 (sic) [Note: "Subdivision 2002-0114" Crossed out in green/ink-Subdivision "7923"] There was a misunderstanding regarding the acreages and therefore the map has been revised.

Attached please find:

Ten copies of the Revised Survey Map depicting the above subdivision."

The revised subdivision map dated September 20, 2005 ("FOURTH REVISION") denotes "LOT 88-A-1 40.00 Acres" and "LOT 88-A 34.872 Acres", "LOT 86-B 24.313 Acres" and "LOT 86-B 20.000 Acres", and "LOT 86-A-1 10.559 Acres" and "LOT 86-A 20.000 Acres". (Note: The Planning Director notes this final plat map was not acknowledged by the PD or circulated to the agencies).

Subsequent to granting final approval to SUB 7923 and final plat map dated December 23, 2004, the applicant's surveyor submitted transmittal letter dated November 30, 2005, which states in part:.

"On behalf of Jack Furtado, I am submitting Revised Subdivision Maps for Subdivision 2002-0114 (sic) [Note: "Subdivision 2002-0114" Crossed out in green/ink-Subdivision "7923"] Again, the acreages of the two lots have been revised, Lots 86-A-1 and 88-A-1 (Lot 86-B is unchanged) and the boundary between them has been modified accordingly.

Attached please find:

Ten copies of the Revised Survey Map dated November 13, 2005.

I certify that the monuments have been set on all corners of all lots."

This revised subdivision map dated November 13, 2005 ("FIFTH REVISION") denotes "LOT 88-A-1 40.00 Acres", "LOT 86-B 24.313 Acres", and "LOT 86-A-1 10.558 Acres". (Note: The Planning Director notes this final plat map was not acknowledged by the PD or circulated to the agencies). And, subsequent to filing the revised subdivision map dated November 13, 2005. it appears that the surveyor filed copies of a revised subdivision map dated December 13, 2005 ("SIXTH REVISION") which denotes "LOT 88-A-1 40.01 Acres", "LOT 86-B-1 24.313 Acres", and "LOT 86-A-1 10.558 Acres".

The Planning Department's letter dated December 14, 2005 in SUB 7923 states in part:

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"This is to acknowledge receipt of ten (10) copies of the second revised final plat map dated December 13, 2005 for the referenced subdivision application.

Please be advised that we have certified the second revised final plat map of which three (3) are enclosed. Copies of the second revised final plat map have been circulated to the listed officers for their files."

Therefore, the revised subdivision map dated December 13, 2005 ("SIXTH REVISION") superceded and replaced the original approved final plat map dated December 23, 2004 creating the following lots: "LOT 88-A-1 20.000 Acres", "LOT 86-B 24.313 Acres", and "LOT 86-A-1 30.559 Acres", whereby, the 3 lots originally permitted pursuant to Section 23-7, were revised as follows "LOT 88-A-1" to "40.001 Acres", "LOT 86-B" to "LOT 86-B-1 24.313 Acres" and "LOT 86-A-1" to "10.558 Acres" on December 14, 2005.

However, Section 23-14, Variances, states in part:

"Variances from the provisions of this chapter may be granted; provided, that a variance shall not allow the introduction of a use not otherwise permitted within the district; and provided further that a variance shall not primarily effectuate relief from applicable density limitations.
(Emphasis added).

The circumstances and nature of the previous subdivision (SUB 7923) creating the subject TMK property containing 40 + acres was essentially to enable the previous owners including the applicants to consolidate and resubdivide 74 acres into 3 lots. Given the previous subdivision aggregate land area and zoning, a maximum of 3 lots is possible or permitted. Therefore, to grant variances or relief from Chapter 23, Subdivisions to further enable the applicants to create an additional or fourth lot from the original subdivision (SUB 7923) with an overall aggregate area of 74 + acres zoned A-20a would be contrary to Section 23-14, and nature and intent to permit SUB 7923 pursuant to Section 23-7.

Further, Section 23-15, Grounds for variances, states in part:

"No variance will 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

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- (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."

Given the purposed and nature of SUB 7923, the applicants and owners of the subject TMK property were allowed to create the subject TMK property. To further grant relief from Chapter 23, Subdivision to enable and allow the applicants to create an additional lot would not conform to the overall zoning of the neighborhood and goals, policies and standards of the Hawaii County General Plan

The proposed variance would enable the applicant or owners to create or add another lot to subdivision with substandard infrastructure. Your variance request from the minimum water supply and road improvements required by Chapter 23, Subdivisions, Division 2, Improvements Required, Section 23-84, Water Supply (1)(2), Section 23-87, Standard for nondedicable street; escrow maintenance fund, and Section 23-95, Right-of-way improvement to permit proposed 2-lot subdivision of the subject property created by SUB 7923 is denied.

In accordance with Ordinance No. 99-111 or Chapter 23, Article 1, General Provisions, Section 23-5 Appeals, you may appeal the director's decision and 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:
 - (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 owner of the affected property and shall provide the board of appeals with the proof of service.

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- (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.

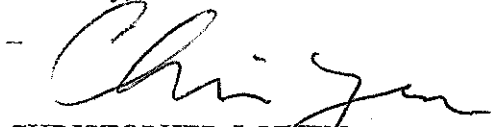
The board of appeals may affirm the decision of the director, or it may reverse or modify the decision, or it may reverse or modify the decision or remand the decision with appropriate instructions if based upon the preponderance of evidence the board finds that:

- (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.

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

WRY/CJY:cd

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Enclosure

xc: Manager-DWS (w/o Enc.)
Chief Engineer-DPW (w/o Enc.)
SUB 06-000406 (w/o Enc.)
Leonard and Lynn Kubousek (w/o Enc.)
James H. Cobb (w/o Enc.)
Carrie B. Mospens Cobb (w/o Enc.)
Don Shaw (w/o Enc.)