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County of Hawaii
PLANNING DEPARTMENT

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February 12, 2007

Mr. Roy A. Vitousek III, Esq.
CADES SCHUTTE LLP
75-170 Hualalai Road, Suite B-303
Kailua-Kona, HI 96740

Dear Mr. Vitousek:

VARIANCE APPLICATION-VAR 06-101 (DENIAL)

Agent: ROY A. VITOUSEK III, ESQ.
Applicant: CADES SCHUTTE, LLP
Owner: EDMUND JIN, ET AL.
Request: Variance from Chapter 23, Subdivisions,
Article 6, Division 2, Improvements Required,
Section 23-84, Water Supply, (1)(2)
Tax Map Key: 8-7-013:011, (SUB 06-000409)

After reviewing your variance application and information submitted, the Planning Director denies your variance request from Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-84, Water Supply, (1)(2), to allow a proposed 6-lot subdivision (SUB 06-000409 to be served by private residential catchment systems.

The Planning Director has concluded that the variance from the minimum subdivision water system requirements required by Chapter 23, Subdivisions, be **denied** based the following findings and Rule 22-Water Variance:

BACKGROUND

1. **Location.** The referenced TMK property, Lot 3 containing approximately 35.90 acres, being the whole of Grant 10013 to Susan Eleneka and Grant S-14061 to William Eleneka Ontai, Et al., is situated at Olelomoana 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 applicant states the current owners purchased the property in late September 2006. The previous owners submitted subdivision application (06-000409) and preliminary plat map (PPM) proposing to subdivide the subject TMK property into 6-lots. Further action on the proposed subdivision was deferred according to a letter dated October 26, 2006 in the subdivision file.
4. **Variance Application.** The applicant, on behalf of the current owners submitted a variance application on or about December 21, 2006 to the Planning Department in Kona.

The applicant's background report attached to the variance application states in part the following:

Pages 1-2. "The Property runs from Mamalahoa Highway up to approximately 1,760 feet in elevation and receives approximately 60+ inches of rainfall annually and therefore qualifies for a water variance under the Planning Department's new Rule 22. As shown on the enclosed GIS map, the 60' rainfall line apparently utilized by the Planning Department in reviewing variance applications runs less than 50 feet mauka of the property boundary. **Exhibit 5.** The attached photographs depict the nature and extent of vegetation present on the property, demonstrating that it receives more than adequate rainfall to support private residential catchment water systems. The approximate property boundaries are depicted on the first two photographs. **Exhibit 6.** Given the proximity of the 60-inch isohyet line to the owners' Property, and because the location of the isohyet line is only an approximation of rainfall patterns intended to assist in large scale hydrogeological resource assessment, it is reasonable to infer that the property receives sufficient rainfall annually to allow effective use of private residential catchment systems."

5. **Agency Comments and Requirements-VAR 06-101:**
 - a. The State Department of Health (DOH) memorandum is dated January 29, 2007. (Refer to memorandum in variance file).

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- b. The Department of Water Supply (DWS) memorandum, dated January 29, 2007 states in part:

“We have reviewed the subject variance application; and our comments from our memorandum to you of September 26, 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 6.6 miles from the property.”

6. **Notice to Surrounding Property Owners/Sign.** The applicant forwarded transmittal letter dated January 17, 2007, copy of notice dated January 16, 2007, and other attachments showing a notice regarding variance application was mailed 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 January 16, 2007. The public notice was published in the Hawaii Tribune Herald and West Hawaii Today on January 14, 2007.

Posted Sign. The applicant forwarded a memorandum dated January 8, 2007, affidavit, and pictures of posted sign.

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. The State Department of Health has no specific rules or regulations relating to the utilization, construction or inspection of private roof or rain catchment water systems for potable or emergency uses.

The alternative to a water system proposed by the applicant “private residential catchment systems” by the individual lot owner(s) would not meet the intent and purpose of the Subdivision Code; and is not allowed pursuant to Planning Department Rule 22-Water Variance, effective February 25, 2006. Generally, Rule 22 is both a rule and statement of criteria to be used so that consistent decisions can be made on water variance requests.

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Section 23-84 of the Subdivision Code requires a water system, and Rule 22 limits subdivisions requesting a variance from water supply to six (6) lots, and, requires that a proposed subdivision (limited to 6 lots) requesting a variance to allow individual rainwater catchment systems for potable and emergency needs must receive a minimum 60 inches of annual rainfall for each lot served by catchment. Rule 22, states in part:

“22-4 Minimum rainfall.

Except as provided in Rule 22-6, all lots to be served by catchment shall be served by catchment shall have an average annual rainfall of not less than 60”. The annual rainfall can be proven by rainfall records at comparable rain gauges, or by the USGS rainfall map.”

Rule 22 allows the rainfall to be proved by either the USGS rainfall map or by rain gauge data. The analysis of the information and comparison of maps attached to the variance application and other rainfall maps and rainfall data at the Planning Department, etc. indicate that the entire subject TMK property is below the 60” isohyet line and does not receive 60 inches of rainfall annually. The elevation of the property begins at above 1280 feet and ends about 1760 feet. Although the very top of the property is near the 60” isohyet line, most of the proposed lots are much lower. In view of the applicant’s submittals, e.g. Exhibit(s) and other historical data published by the Hawaii State Climate Office (HSCO), it appears that the proposed subdivision is near active rain-gauge station “OPIHIHALE 2”. This rain gauge is situated approximately 1.2 miles +/- south of the TMK property near the Mamalahoa Highway. According to a 1996 U.S. Geological Survey publication, Opihihale No. 2’s elevation or altitude is 1270 feet. The rain gauge data indicates that the actual rainfall at the subdivision is well under 60”. Historical rainfall data published by HSCO for OPIHIHALE 2 show the mean average rainfall measured for the years 1956-2000 is 41.20 inches. The annual rainfall at the property and property’s boundary on Mamalahoa Highway or South Kona Belt Road is probably about 41”. Therefore, the proposed 6-lot subdivision does not receive minimum 60” annual rainfall and the applicant’s request to allow individual rainwater catchment systems for potable and emergency is not allowed or eligible pursuant to Rule 22-Water Variance which requires the proposed subdivision to receive minimum 60” annual rainfall.

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VARIANCE DECISION

In view of the above, the proposed variance would not fulfill the intent of the Subdivision Code and does not meet with all the requirements or Rule 22-Water Variance. Therefore, the applicant's variance application to allow proposed 6-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 request to allow the proposed subdivision to be served by private catchment systems 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.

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**.