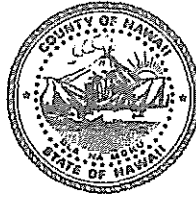


Harry Kim
Mayor



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

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-VAR 06-102

Agent: ROY A. VITOUSEK III, ESQ.
Applicant: CADES SCHUTTE, LLP
Owners: VINCENT SAXTON, ET AL.
Request: Variance from Chapter 23, Subdivisions,
Article 6, Division 2, Improvements Required,
Section 23-84, Water Supply, (1)(2)
Tax Map Key: 8-7-013:026, Lot 12, (SUB 05-000176)

After reviewing subject variance application, the Planning Director certifies the approval of Variance-VAR 06-102 subject to variance conditions. VAR 06-102 permits proposed 3-lot subdivision (SUB05-000176) without providing a water system meeting the minimum requirements of the 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 **approved** based on the following findings:

BACKGROUND

Mr. Roy A. Vitousek III, Esq.

CADES SCHUTTE LLP

Page 2

February 12, 2007

1. **Location.** The referenced TMK property, Lot 12 containing approximately 25.63 acres, being portions of Grant 2996 to Kaniua, Grant 3607 to J. M. Monsarrat, and Grant 3396 to K. K. Kaumuloa, is situated at Kolo and Olelomoana 1st, South Kona, Hawaii. According to earlier tax and map records, it appears that Lot 12 or subject TMK property is part of "Kolo Subdivision" allowed circa 1954.
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/owner submitted a subdivision application (SUB 05-000176) and preliminary plat map (PPM) proposing to subdivide subject TMK property into 3-lots. Further action on the proposed subdivision was deferred according to a letter dated October 27, 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 mauka to South Kona Forest Reserve at approximately 2200 feet in elevation. The property 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 passes through the Property about half-way up the Property. **Exhibit 5.** The enclosed photographs further 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."

5. **Agency Comments and Requirements (VAR 06-102):**
 - a. The Hawaii County Fire Department memorandum is dated January 29, 2007. (Refer to memorandum in variance file).
 - b. The Department of Water Supply (DWS) memorandum, dated February 1, 2007, states in part:

"We have reviewed the subject variance application and our comments from our memorandum of November 7, 2005, 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 6.5 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 and no objections were received from surrounding property owners or public.

Therefore, after considering the circumstances and variance background information, rainfall information provided by the applicant, and agency comments, the Planning Director has determined that there are special or unusual circumstances applying to the TMK property which exist either to a degree which deprives the applicant or owners of property rights that would otherwise be available or to a degree which obviously interferes with the best use or manner of development of the subject property.

ALTERNATIVES

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.

Mr. Roy A. Vitousek III, Esq.
CADES SCHUTTE LLP
Page 4
February 12, 2007

The first alternative requires the applicant to extend or improve the existing county water system and provide the necessary dedicable water system improvements in accordance with DWS standards. The second alternative would be to design, drill and develop private wells and install the necessary water system improvements in accordance with DWS standards.

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" for proposed lots (Lot 12-B and Lot 12-C) can meet the intent and purpose of the Subdivision Code; and 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. 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 3 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 including a USGS layer at the Planning Department, etc. shows the 60" isohyet line bisects the subject property at approximately 1840 feet elevation; and, therefore, according to the PPM and USGS (layer) map, a portion of the "flag" of proposed "LOT 12-B" and entire "flag" of proposed "LOT 12-C" receives at least 60 inches of rainfall annually. According to USGS map layer and rainfall data in the Planning Department, the elevation of the property near the Mamalahoa Highway begins at approximately 1220 feet +/- and ends at about 2120 feet +.

Mr. Roy A. Vitousek III, Esq.
CADES SCHUTTE LLP
Page 5
February 12, 2007

According to the variance site plan map, an existing dwelling and 2 separate water catchment tanks were constructed on the property or within proposed Lot 12-A which abuts the Mamalahoa Highway. The 60" isohyet line bisects the subject TMK property at approximately the 1840 feet elevation. Thus, a portion of the property above proposed Lot 12-A or approximately 50 % of the "flag" of proposed Lot 12-B and the entire "flag" of proposed Lot 12-C receives at least 60" annual rainfall. The applicant's request to allow individual rainwater catchment systems for potable and emergency within proposed "mauka" lots above proposed Lot 12-A could be allowed pursuant to Rule 22-Water Variance which requires the proposed subdivision or additional lots to receive minimum 60" annual rainfall.

Based on the foregoing findings and Rule 22, the variance request 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, the variance requested will not be materially detrimental to the public's welfare and will not cause substantial adverse impact to the area's character and to adjoining properties.

VARIANCE DECISION-CONDITIONS

In this instance, the proposed subdivision can meet with all the requirements or Rule 22-Water Variance. Therefore, the applicant's variance application to allow proposed 3-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 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 receipt of final subdivision approval of SUB 05-000176. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting lots not serviced by a County water system or pending 3-lot subdivision application and 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:

Mr. Roy A. Vitousek III, Esq.

CADES SCHUTTE LLP

Page 6

February 12, 2007

- 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 05-000176. 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 or affected additional lots created by SUB 05-000176 not serviced by a County water system. No further subdivision of the lots created by SUB 05-000176 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
- c. Any lots created by SUB 05-000176 may not be made subject to a condominium property regime.
- d. Any dwelling constructed on a proposed lot not serviced by a County water system shall be provided with and maintain a private potable rain catchment system which includes a minimum 6000-gallon water storage capacity for domestic consumption or potable uses. This private water 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 dwelling shall be provided with and maintain a private water 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.

Mr. Roy A. Vitousek III, Esq.

CADES SCHUTTE LLP

Page 7

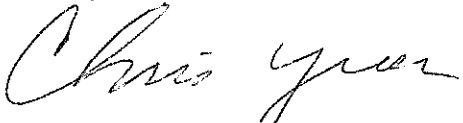
February 12, 2007

- 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 05-000176 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 05-000176, the owner(s) of the lot(s) created by SUB 05-000176 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.
 - h. 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.
- 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. Roy A. Vitousek III, Esq.
CADES SCHUTTE LLP
Page 8
February 12, 2007

Should any of the foregoing stated conditions not be complied with, the Planning Director may proceed to declare the subject Variance Permit null and void.

Sincerely,

A handwritten signature in cursive script, appearing to read "Chris Yuen".

CHRISTOPHER J. YUEN
Planning Director

WRY:cd
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xc: Manager-DWS
SUB 05-000176