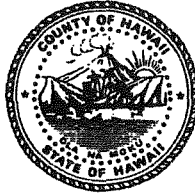


Harry Kim
Mayor



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 29, 2007

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

Dear Mr. Roy A. Vitousek:

VARIANCE-VAR 07-028 (DENIAL)

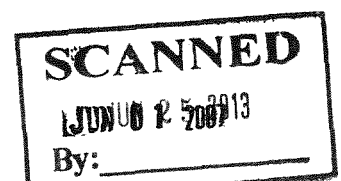
Agent: ROY A. VITOUSEK III, ESQ.
Applicant: CADES SCHUTTE, LLP
Owner: PACIFIC HORIZONS DEVELOPMENT COMPANY LP
**Request: Variance from Chapter 23, Subdivisions,
Article 6, Division 2, Improvements Required,
Section 23-84, Water Supply, (1)(2)**
Tax Map Key: 8-7-010:009, (SUB 06-000262)

After reviewing the subject variance application and information submitted, the Planning Director denies your variance from Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-84, Water Supply, (1), to allow a proposed subdivision (6-lots) 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 referenced TMK property containing 47.906 acres, portion of Grant 3166 is situated at Kukuiope 1st, 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 subdivider's engineer filed a subdivision application proposing to subdivide the subject TMK property. The proposed subdivision application file (SUB 06-000262) includes a preliminary plat map (PPM) dated January 11, 2006 proposing to subdivide the subject TMK property into 10-lots; and, further action on the subdivision application was deferred according to letter dated March 28, 2006 in SUB 06-000262 file.
4. **Variance Application.** The owner's agent submitted the subject variance application to the Planning Department-Kona on April 5, 2007.

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

Page 1-2. "The Property is in Compliance with Rule 22-4 of the Planning Department Rules of Practice and Procedure

The Property runs from Mamalahoa Highway up to approximately 1650 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 approximately 850 feet mauka of the property boundary. **Exhibit 4.** The attached photographs depict the nature and extent of vegetation present on the property, demonstrating that it receives more than adequate rainfall to support agricultural crops and private residential catchment systems. **Exhibit 5.** Given the proximity of the 60-inch (60") isohyet line to the Property, it is reasonable to infer that the property receives sufficient rainfall annually to allow effective use of private residential catchment systems. The location of the isohyet line is an approximation of rainfall patterns intended to assist in large scale hydrogeological resource assessment.

Steven Bowles, an hydrogeologist with extensive material professional experience with the rainfall patterns in the South Kona to Ka'u region, has testified that rainfall patterns are not particularly well-studied or known in this region and that present isohyet lines are very rough approximations which should not be utilized as strict regulatory standards. See Declaration of Stephen P. Bowles, dated February 1, 2006, attached hereto as **Exhibit 6**. Based on the location of the Property relative to the County's 60" rainfall isohyet line and the evidence of adequate rainfall to support private residential catchment systems, Applicant respectfully requests that the Department approve this variance application."

5. **Agency Comments and Requirements-VAR 07-028:**

- a. The State Department of Health (DOH) memorandum is dated May 2, 2007. (Refer to memorandum in subject variance file).
- b. The Department of Water Supply (DWS) memorandum, dated May 9, 2007, states in part:

“Please be informed 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 5.1 miles from the property at the Hookena Junction.”

- c. The County of Hawaii Fire Department memorandum, dated May 16, 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.”

6. **Notice to Surrounding Property Owners/Sign.** The applicant forwarded transmittal letter dated May 11, 2007, affidavit, copy of notice dated May 4, 2007, and other attachments showing a notice regarding variance application was mailed to a list of surrounding property owner(s). According to an affidavit dated May 11, 2007 the notice was mailed to surrounding property owner(s) on May 4, 2007. The public notice was published in the Hawaii Tribune Herald and West Hawaii Today on April 26, 2007.

Posted Sign. The applicant forwarded transmittal memorandum dated May 2, 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.

Mr. Roy A. Vitousek III, Esq.
CADES SCHUTTE, LLP
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May 29, 2007

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.

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 applicant's background information and exhibits (e.g. Page 1 and 2 which states in part: "As shown on the enclosed GIS map, the 60" rainfall line apparently utilized by the Planning Department in reviewing variance applications runs approximately 850 feet mauka of the property boundary. **Exhibit 4.**") compared with rainfall maps and rainfall data utilized by the Planning Department and other governmental agencies clearly indicates the entire subject TMK property is approximately 800 feet to 900 feet below the 60" isohyet line and does not receive 60 inches of rainfall annually. The elevation of the property begins at approximately 1160 feet and ends about 1640 feet. 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 subject TMK property is near active rain-gauge station "OPIHIHALE 2". This rain gauge is situated approximately 2.6 +/- miles south of the TMK property near the Mamalahoa Highway.

Mr. Roy A. Vitousek III, Esq.
CADES SCHUTTE, LLP
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May 29, 2007

According to a 1996 U.S. Geological Survey publication-Report 95-4212, Opihihale No. 2's elevation or altitude is 1270 feet. The rain gauge's elevation and rainfall 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 (elevation 1160 feet +/-) on or along the Mamalahoa Highway or South Kona Belt Road is probably about 41 inches. Therefore, the subject TMK property or proposed subdivision does not receive minimum 60" annual rainfall and the applicant's request to allow individual rainwater catchment systems for potable and emergency purposes is not allowed or eligible pursuant to Rule 22-Water Variance which requires the proposed subdivision (6-lots) to receive minimum 60 inch annual rainfall.

The alternative to a water system proposed by the applicant's agent--"private residential catchment systems"--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 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 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.

Mr. Roy A. Vitousek III, Esq.
CADES SCHUTTE, LLP
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May 29, 2007

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**.

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,

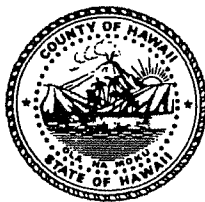


CHRISTOPHER J. YUEN
Planning Director

WRY/DSA:cd
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Enclosure

xc: Manager-DWS
SUB 06-000262



County of Hawai'i

BOARD OF APPEALS

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

February 5, 2008

Roy A. Vitousek III, Esq.
Cades Schutte
75-170 Hualalai Road, Suite B-303
Kailua-Kona, HI 96740

Amy Self, Esq.
Office of the Corporation Counsel
101 Aupuni Street, Suite 325
Hilo, HI 96720

Stephen D. Whittaker, Esq.
PO Box 964
Kailua-Kona, HI 96745

Dear Mr. Vitousek, Mr. Whittaker and Ms. Self:

Board of Appeals (BOA 07-000049)

Petitioner: Pacific Horizons Development Co. LP

Request: Appeal of Decision by the Planning Director dated May 29, 2007,
denial of the variance request (VAR 07-028) relating to minimum
water supply requirements of Chapter 23, Subdivision Code

Tax Map Key: (3) 8-7-10:9, Kukuiope 1st, South Kona, Hawai'i

The Board of Appeals at its January 25, 2008 meeting voted to uphold the Director's decision on the grounds that the evidence on the whole record does not show that it is in violation of the Code or other applicable laws; it does not show an abuse of discretion and it is not clearly erroneous in view of the reliable, probative, and substantial evidence on the record.


For your information, the Board dismissed Intervenor Christopher Coonen in the proceedings as he was not in attendance to represent himself.

The Chair directed the prevailing party (Ms. Self) to prepare the proposed Findings of Fact, Conclusions of Law and Decision and Order within thirty days after the close of the hearing, which is January 25, 2008. The proposed Findings of Fact, Conclusions of Law and Decision and Order shall also be served on each party to the proceeding, and each party shall have fifteen days from the date of service thereof to submit written comments or objections to the Board.

Roy A. Vitousek III, Esq.
Stephen D. Whittaker, Esq.
Amy Self, Esq.

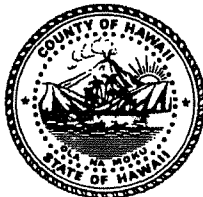
Should you have any questions in the meantime, please feel free to contact Alice Kawaha of the Planning Department, who serves as staff to the Board, at 961-8288, Ext. 203.

Sincerely,



Joel Gimpel, Chairman
Board of Appeals

xc: Christopher R. Coonen
Bernard McClean
Board of Appeals
Corporation Counsel, BOA Attorney
Planning Director
Ministerial Division – Mr. Daryn Arai
Planning Department - Kona



County of Hawai'i

BOARD OF APPEALS

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JUN 20 2008

Roy A. Vitousek III, Esq.
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75-170 Hualalai Road, Suite B-303
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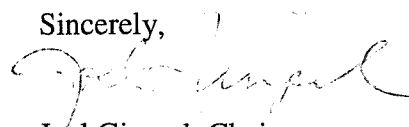
Dear Mr. Vitousek:

Board of Appeals (BOA 07-000049)
Petitioner: Pacific Horizons Development Co. LP
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At its June 13, 2008 meeting the Board acknowledged receipt of your letter dated May 19, 2008, informing the Board of the Appellant's agreement with the Planning Department and withdrawal of the above-referenced appeal based on the agreement.

Should you have any questions, 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,


Joel Gimpel, Chairman
Board of Appeals
AGK:smn

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xc w/ltr.: Board of Appeals
Corporation Counsel, BOA Attorney
Corporation Counsel, Planning Department Attorney (w/o ltr)
Planning Director
Ministerial Division – Mr. Daryn Arai
Planning Department – Kona

JUN 20 2008