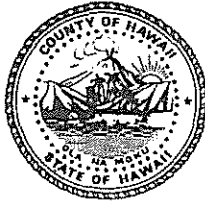


William P. Kenoi  
Mayor



BJ Leithead Todd  
Planning Director

## County of Hawaii

### PLANNING DEPARTMENT

Aupuni Center • 101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720  
Phone (808) 961-8288 • Fax (808) 961-8742

March 2, 2009

Muhammad Yunis, DVM  
RR 2, Box 3918  
Pahoa, HI 96778

Dear Dr. Yunis:

#### **VARIANCE-VAR 08-029**

**Applicant:** MUHAMMAD YUNIS, DVM  
**Owners:** MUHAMMAD YUNIS, DVM, ET AL.  
**Request:** Variance from Chapter 23, Subdivisions,  
Article 6, Division 2, Improvements Required,  
Section 23-84, Water Supply, (1)(2)

**Tax Map Key: 1-8-091:021 and 022, (SUB 07-000676)**

After reviewing your variance application, the Planning Director certifies approval of Variance-VAR 08-029 subject to variance conditions. The variance permits proposed 6-lot subdivision (SUB 07-000676) to be created without providing a water system meeting minimum requirements of the Department of Water Supply (DWS). The variance is from Hawaii County Code, Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-84, Water Supply, (1)(2).

The Planning Director has concluded that the applicant's variance application from minimum subdivision water system requirements for proposed subdivision be **approved** based on the following findings:

#### **BACKGROUND**

1. **Location.** The referenced TMK properties containing an aggregate area of 33.23 acres, Olaa New Track Lots, being portion of Grant 8091 to Marie De Mello Barrozo, are situated at Olaa, Puna, 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 applicant or subdivider submitted subdivision application (SUB 07-000676) including preliminary plat map (PPM), proposing to subdivide the above referenced TMK properties into 6-lots. Further action on subdivision application (SUB 07-000676) was deferred pursuant to letter dated November 30, 2007 in the subdivision application file.
4. **Puna Community Development Plan (PCDP).** The proposed subdivision is subject to PCDP adopted by Ordinance 08-116 and signed into law on September 19, 2008. In view of the foregoing, the proposed subdivision application is subject to and required to comply with Planning Department Rule No. 22, Water Variance and PCDP requirements.
5. **Variance Application.** The applicant submitted the variance application on May 5, 2008 and other required submittals on May 23, 2008. The variance application includes an attachment and explanation on pages 2 and 3 which states in part the following:

Page 2: "The County DWS does not have a water system in this area. To do so would require a new source and extensive improvements, including storage tanks and transmission system. The Department (sic) does not have funds for these improvements.

Providing potable water meeting County dedicable standards to the site would be an inordinate expense for the applicant to absorb. At the same time, given the rainfall in this area, the applicant believes, that a water catchment system would be sufficient. As such, the applicant is requesting relief from this water requirement."

Page 3: "The applicant is unable to make the extensive water source improvements required by the Water Development (sic) or to develop its own water well meeting with the Water Department's standards. The applicant is thus requesting a variance from the minimum water requirements (Chapter 23, Article 6, Division 2, Section 23-84, Hawaii County Code) by having a water catchment system."

6. **Variance Application (VAR 08-029)-Agency Comments and Requirements:**

- a. The State of Hawaii Department of Health (DOH) memorandum is dated June 5, 2008. Refer to SOF-DOH memorandum in variance file.
- b. The Department of Water Supply (DWS) memorandum, dated June 18, 2008, states in part:

“We have reviewed the subject application and have the following comments and conditions.

Our comments from our December 18, 2007, memorandum to you regarding the subject subdivision still stand. The nearest point of connection is from an existing 3-inch waterline within Ihope Road; however, the Department’s existing water system facilities cannot support the proposed 6-lot subdivision at this time.

We have no objections to the subject application as the applicant proposes to use private rainwater catchment systems for each lot within the subdivision.”

7. **Notice to Surrounding Owners.** The applicant’s forwarded copy(s) of notice sent to revised list of surrounding property owner(s) within 300 feet of subject TMK property and mailing receipts dated June 9, 2008 and July 16, 2008. Notice of the variance application was published in the Hawaii Tribune Herald and West Hawaii Today on June 5, 2008.

**Posted Sign.** The applicant filed an affidavit dated July 16, 2008 for a sign posted on subject TMK property and submitted a photograph of the 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. The owners listed on the subdivision application’s preliminary plat map filed a letter dated July 24, 2008 supporting the variance application.

Therefore, after considering applicant’s variance application and variance background information including rainfall information and PCDD requirements, the Planning Director has determined that there are special or unusual circumstances applying to subject TMK properties

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and proposed subdivision which deprives the applicant-owners or subdivider 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**

The copy of the DWS memorandum attached to the variance application dated December 18, 2007 and DWS memorandum dated December 18, 2007 in subdivision file (SUB 07-000676) states in part the following:

"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. Currently, sufficient funding is not available and no time schedule is set."

The first alternative requires the applicant to make "extensive improvements and additions" to the existing county DWS water system in accordance with the DWS memorandum in the subdivision file.

The second alternative would be to design, drill and develop private wells and install the necessary water system improvements in accordance with DWS standards.

In view of the above, there are no other reasonable alternatives in resolving the difficulty of the applicant or subdividers. The imposition of improving the existing public water system or providing an approved alternative private water system meeting DWS standards for proposed 6-lot subdivision (SUB 07-000676) would be putting excessive demands upon the applicant when a more reasonable alternative is available.

### **INTENT AND PURPOSE-WATER VARIANCE**

The intent and purpose of requiring a water system for a proposed subdivision is to assure that adequate water is available for human consumption and fire protection.

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 or "water catchment system in lieu of DWS-approved system" or allow and utilize privately owned individual rain water catchment systems for proposed 6-lot subdivision 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 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."

The analysis of existing rainfall within the subject TMK properties or immediate area utilizing maps at the Planning Department, DPW, and information provided by the applicant indicate that there is adequate 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. According to a map or Plate 6-WATER-RESOURCES INVESTIGATIONS REPORT 95-4212 (Dated 1994/1996), the proposed subdivision appears to be nearest active rain gage station "91.14" (KURTISTOWN) which received 177.51 inches of rain in 2002. The analysis of the applicant's submittals compared with recent rainfall data and historical rainfall data for the area show the subject TMK property and surrounding areas receive approximately 160 inches +/- of rainfall yearly. The analysis of the applicant's background information, Planning Department GIS data, and other historical rainfall data maintained by Hawaii State Climate Office (HSCO) for old historical rain gauges sited in the Mountain View nearest the proposed subdivision indicate the surrounding areas receive at least 60+ inches of rainfall annually. The proposed subdivision meets Rule No. 22-Water Variance.

Given approval of the previous subdivision-SUB 03-000157 in 2006 creating the referenced TMK properties from SUB 03-000157 and other circumstances the applicant's request for variance to allow "water catchment system in lieu of DWS-approved system" within proposed subdivision meets Rule No. 22 including PCDP requirements. The provisions for water storage, water distribution, and construction of private rain water catchment system(s) for the proposed subdivision-SUB 07-000676 will be addressed by the applicant or future lot owner(s) in

accordance with Rule No. 22 and variance conditions.

The applicant's variance application was acknowledged by letter dated May 28, 2008 and additional time to review previous subdivision approvals was necessary. The applicant agreed to extend the date on which the Planning Director shall render a decision on the subject variance to no later than March 6, 2009.

Further, based on the foregoing findings, this variance request would be consistent with the general purpose of the zoning district and the intents and purposes of the Zoning Code, Subdivision Code, Puna Community Development Plan (PCDP) and County General Plan. Furthermore, the variance requested will not be 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**

The variance request to allow proposed 6-lot subdivision of the subject TMK property without providing a 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 owner, 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 07-000676. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting proposed lots and or subdivision application 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:
  - a. The applicant or subdivider agrees and accepts the fact that a County dedicable public water system is not now able to service the proposed subdivision SUB 07-000676. 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. No further subdivision of lots created by SUB 07-000676 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
- c. Any lots created by SUB 07-000676 may not be made subject to a condominium property regime.
- d. Any dwelling constructed on a 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.
- 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 any lot created by SUB 07-000676 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 07-000676, the owner(s) of the lot(s) created by SUB 07-000676 shall

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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.

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,



BJ LEITHEAD TODD  
Planning Director

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xc: Manager-DWS  
SUB 07-000676