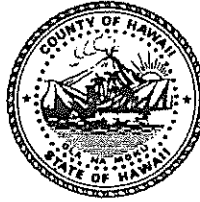


William P. Kenoi
Mayor



BJ Leithead Todd
Director

Margaret K. Masunaga
Deputy

County of Hawai'i

PLANNING DEPARTMENT

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

May 3, 2010

Ms. Chrystal Thomas Yamasaki, L.P.L.S.
WES THOMAS ASSOCIATES
75-5749 Kalawa Street
Kailua-Kona, HI 96740

Dear Ms. Yamasaki:

SUBJECT: VARIANCE-VAR 08-042

Agent: WES THOMAS ASSOCIATES
Applicants: DAIN USHIRODA, ET AL.
Owners: DAIN USHIRODA, ET AL.
Request: Variance from Chapter 23, Subdivisions,
Improvements Required
Tax Map Key: 8-1-002:036, (SUB 06-000467)

After reviewing your variance application, the Planning Director certifies approval of Variance-VAR 08-042 subject to variance conditions. The variance permits proposed 7-lot subdivision application (SUB 06-000467) to be created without providing water supply system to 6-proposed lots meeting minimum requirements of the County-DWS and without constructing dedicable roadway improvements required by the Chapter 23, Subdivisions. The variance is from Hawaii County Code, Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-84, Water Supply, (1)(2), Section 23-86, Requirements for dedicable streets, and Section 23-93, Street Lights.

The Planning Director has concluded that the variance from the minimum subdivision water system requirements and dedicable roadways required for the proposed subdivision be **approved** based on the following findings:

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BACKGROUND

1. **Location.** The referenced TMK property, containing approximately 3.98 acres, portion of Grant 2910 to John Yates, is situated at Kalukalu, South Kona, Hawaii.
2. **Zoning.** The subject property is zoned Single-Family Residential (RS-15) by the County and designated Urban "U" by the State Land Use Commission (LUC).
3. **Subdivision Request/PPM.** The owner's submitted proposed 7-lot subdivision application (SUB 06-000467) and revised preliminary plat map (PPM) dated May 9, 2008. Further action on the subdivision application and preliminary plat map (PPM) is being deferred according to an earlier letter in the subdivision file.
4. **Variance Application.** The applicant's agent submitted a variance application from the water supply and roadway improvements required for the revised PPM. The variance application was acknowledged by Planning Department letter dated July 8, 2008. The agent's transmittal letter dated June 25, 2008 includes background information regarding water supply and status of roadways fronting proposed subdivision. The letter states in part the following:

Page 2-"PART 1":

"In applying for the subdivision, we have been informed by the Department of Water Supply that "the subject property is located at an elevation where water cannot be delivered at adequate pressure and volume under peak-flow and fire-flow conditions." The property is entitled to one (1) water meter (with an executed elevation agreement). The remaining six (6) lots will be serviced by private catchment systems. The properties mauka of this parcel are residential lots that vary in size from 16,000 square feet to nearly an acre. One (1) lot on this road is in excess of six (6) acres. Most of the lots are occupied and use private catchment systems for potable water."

Page 3 "PART 2":

"Konawaena School Road from Mamalahoa Highway to the school and up to the Kona Krafts facility have (sic) pavement widths in excess of 34 feet. This is illustrated by the photos fronting Konawaena School and Kona Krafts fronting Kona Krafts. Fronting Kona Krafts, the pavement is approximately 24 feet wide. The stretch of road fronting the subject property has a pavement width of 8 to 10

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feet. A portion of the Southerly side of the road has suffered some damage due to previous storm run-off and is slated to be repaired by others. This is illustrated by the photos fronting the subject property. Once the road passes the first 375 feet of the frontage along the subject property the road pavement is then approximately 16 feet wide and is in excellent condition. This is illustrated by the photos fronting the mauka 205 feet of road frontage.

This road is used on a daily basis by over 30 lots mauka of the subject property. The subject property and the lots mauka were created circa 1969, or earlier.”

5. **Variance Application-VAR 08-042-Agency Comments and Requirements:**

- a. The State of Hawaii-Department of Health (DOH) memorandum is dated July 8, 2008. Refer to SOH-DOH memorandum in the variance application file.
- b. The County of Hawaii-Hawaii Fire Department (HFD) memorandum is dated July 16, 2008. Refer to COH-HFD memorandum in the variance application file.
- c. The Department of Water Supply (DWS) memorandum dated July 23, 2008 states in part:

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

Please reference our letter, dated February 9, 2007, to you regarding Variance Application No. 06-100 and Subdivision Application No. 04-000068. Our comments from our February 9, 2007, letter also apply to this application:

1. Although the Department’s existing water system facilities cannot support all lots within the proposed 7-lot subdivision, one unit of water (limited to a maximum of 600 gallons per day) can be made available for one of the lots within the proposed subdivision. The applicant shall indicate, in writing, which lot within the proposed subdivision will be assigned the one unit of water available.
2. Due the subject parcel not being within the Department’s existing

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pressure zone, the applicant will be required to execute an Elevation Agreement with the Department. In addition, the applicant will be required to submit a tank and pump system schematic, prepared by a professional engineer licensed in the State of Hawai'i, for review and approval by the Department. The schematic must show which proposed lot will be served and how it will be supplied with water at adequate pressure and volume.

We will also note that the applicant has not indicated how the other proposed lots within the subdivision will be provided with water. For your information, we have no objection to the use of private rainwater catchment systems for each lot."

- d. The Department of Public Works (DPW) memorandum is dated July 24, 2008 and states in part the following:

"The road fronting the proposed subdivision along the southern boundary is one lane in width and substandard in vertical alignment. The pavement is in very poor condition. There appears to be considerable traffic using this roadway (maps indicate 40 or more parcels served). Additional lots should not be created without improving it. The 16-foot wide pavement along the south-east boundary is in poor condition.

We recommend the applicant be required to improve and widen the existing road along the entire southern boundary (and necessary transition to the existing Konawaena School road) to an 18-foot minimum pavement width meeting with Subdivision Code Section 23-86. Improvements shall include but not be limited to the drainage system and any necessary relocation of utilities meeting with the approval of DPW."

6. **Notice to Surrounding Owners.** The applicant's agent submitted a transmittal letter dated July 9, 2008 and list of surrounding property owners with affixed USPS receipts dated July 9, 2008. According to the applicant's agent, notice was sent to surrounding property owners pursuant to the Planning Department's letter dated July 2, 2008 acknowledging the variance application.

Affidavit/Posted Sign. The agent submitted sign affidavit dated July 11, 2008 and photographs of sign posted upon subject TMK property.

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7. **Comments from Surrounding Property Owners or Public.** No other agency comments were received. No written objections to the variance application were received from surrounding property owners or public.

ALTERNATIVES/SPECIAL AND UNUSUAL CIRCUMSTANCES

Water Supply. The first alternative requires the applicant or owners to extend and/or improve the nearest DWS 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.

The requirement to extend or improve the nearest public DWS water system or provide an approved alternative private water system meeting DWS standards for the pending subdivision would be putting excessive demands upon the applicant or owners when a more reasonable alternative (e.g. private individual rainwater catchment system for potable and emergency requirements for 6-proposed lots) is available pursuant to Rule 22-Water Variance.

Lot Access/Roadways. The first alternative requires the subdividers to construct a 20 feet wide dedicable pavement, including paved shoulders and swales, from the terminus of the Konawaena School Road, approximately 18+ feet wide roadway constructed upon the Konawaena High School Lot campus, to the proposed access pole for "LOT 6" and proposed "LOT 7" pursuant to DPW memorandum or comments dated December 3, 2008 in the subdivision file. In sum, the DPW is requiring the subdivider to construct approximately a 20 feet wide dedicable roadway including paved shoulders upon a series of privately owned properties owned by others fronting the subject TMK property.

The second alternative acknowledges that the subject TMK property utilizes an old paved section of the "KONAWAENA SCHOOL ROAD" or KSR located upon privately-owned access easements upon "private properties" or upon "Easement 1" and variable width road lot or right-of-way belonging to the subdivider's family. The subject TMK property is currently vacant and was previously an orchard producing coffee. Approximately 30 other homes located mauka of the proposed subdivision, abutting a privately-owned road lot or privately-owned paved section of KSR bordering the subject TMK property, also utilize and/or are dependent on the privately owned KSR roadway section located upon "Easement 1" identified on the PPM. The applicant submitted photographs and site plan showing older decaying "dry stack" perimeter rock walls previously built within and upon "Easement 1" were removed or relocated or "pushed" upon the subject TMK property, and sections or parts of the paved road upon "Easement 1" are more than

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9+ feet wide. These improvements to remove the older misplaced dry stack rock walls built upon "Easement 1" increased the width of the roadway shoulders fronting the proposed subdivision.

INTENT AND PURPOSE OF THE SUBDIVISION CODE

Water Variance. The intent and purpose of requiring a water system for and within a proposed subdivision is to assure that adequate water supply 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's agent, to utilize privately-owned individual rain water catchment systems for those proposed lots not serviced by the DWS system, can meet the intent and purpose of the Subdivision Code, and meets criteria or standards 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 on property zoned for agricultural use. Rule 22, states in part:

"22-4 Minimum rainfall.

Except as provided in Rule 22-6, all lots to 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.

"22-5 Maximum Number of Lots

Except as provided in Rule 22-6, no more than six lots shall be allowed in a catchment subdivision."

In this case, the proposed subdivision is zoned Single-Family Residential (RS-15) and Section 23-84 of the Subdivision Code requires a water supply system. Rule 22 doesn't actually apply to subdivisions zoned RS requesting a variance from water supply system. However, the proposed subdivision or subject TMK property is located in a region which receives at least 60 inches of annual rainfall. In addition, the PPM indicates the size and land area of the "building site" or "body" within and upon the 3 proposed lots with frontage along the "KONAWAENA SCHOOL ROAD" and/or 5 proposed flag lots range between 19,500+ square feet up to 26,300+ square

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feet. The proposed lot sizes exceed the minimum 15,000 square feet required by the zoning code and can accommodate separate and detached rainwater catchment tanks.

Given the location and current capacity of the nearest DWS system and unusual nature of the subdivision and annual rainfall at this property's elevation or within the immediate area, the request for variance from the water supply requirements to permit the proposed subdivision is reasonable. The provisions for water storage, water distribution, and construction of private rain water catchment system(s) will be addressed by the applicant or future lot owner(s) of lots without a DWS service.

Roadway Variance. The intent and purpose of access requirements to a proposed subdivision is to ensure legal and physical access to the proposed lots that is clearly defined and accessible from a public road by domestic and farm vehicles, police, fire, and other service vehicles under various weather conditions without constant maintenance.

The proposed subdivision and approximately 30 residential lots mauka of the proposed subdivision are dependent on the roadway fronting the proposed subdivision. The proposed subdivision and the approximately 30 lots situated mauka of the proposed subdivision are residential in size and rural in character. The KSR road located upon the Konawaena High School Lot identified on the PPM, and subsequent privately-owned properties or easements fronting the proposed subdivision, provide access to larger lots zoned agricultural or a region which includes small pasture enclosures and large agricultural lots zoned agricultural by the County. The paved section of the KSR roadway situated upon the privately-owned properties, or the KSR extension or network of rights-of-way mauka of the school campus, was created many years ago prior to adoption of the Zoning and Subdivision Codes by the County of Hawai'i circa 1967. The subject TMK property's zoning (RS-15) or zoning density without subdividing would allow 11 single-family dwellings to be built upon the subject TMK property without subdividing and to be allowed to access and utilize the current KSR roadway between the intersection of the KSR and Mamalahoa Highway, below the Konawaena High School Lot up to the subject TMK property, without doing any roadway improvements. Therefore, given that the proposed subdivision's density is limited to creating 7 building lots, there should be no adverse impact by permitting the proposed subdivision to utilize the present KSR roadway as access for the proposed 7-lot subdivision. The owner or subdivider is proposing to widen a section of the paved roadway fronting the proposed subdivision (i.e. approximately 375 linear feet by 2 feet wide) from the terminus of the Konawaena School Road upon the Konawaena School High School Lot to the access pole of proposed "LOT 6". The cost to maintain the paved privately-owned section(s) of the roadway or KSR, including compacted shoulders located upon the privately owned properties fronting the proposed subdivision or upon "Easement 1" (50 feet wide), will be continued to be privately addressed and shared among the current owners and/or

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users.

Therefore, given that the proposed subdivision's density and evaluation of current access and roadways fronting the subject TMK property including recent improvements by the subdivider to remove older perimeter rock walls upon "Easement 1" creating a wider gravel shoulder upon "Easement 1", the Planning Director has concluded that construction plans to build dedicable roadway improvements for the proposed 7-lot subdivision required by the DPW memorandum are not necessary or required for the proposed subdivision. In lieu of constructing dedicable roadway improvements upon privately owned properties or upon "Easement 1", the subdivider proposes to widen a section of the 9+ feet roadway to 11+ feet along the frontage of the proposed subdivision including compacted gravel shoulder improvements within "Easement 1" by variance. However the drainage report required by the DPW and other information required by the DPW memorandum will be submitted for approval and addressed by the owner's agent prior to receipt of final subdivision approval.

The variance application submitted by the applicant's agent was acknowledged by letter dated July 2, 2008. Additional time was requested by the subdivider to submit photographs of the current condition of the section of the KSR road fronting the proposed subdivision and show that misplaced or old dilapidated perimeter dry stacked rock walls built upon "Easement 1" were removed from "Easement 1" for the Planning Department files. The applicant or owners/subdivider granted the Planning Director additional time to consider the variance application.

Based on the foregoing findings, the approval of variances requested by the owner's agent 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 from water supply and roadways 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.

DETERMINATION-VARIANCE CONDITIONS

The variance application to permit 7-lot subdivision without providing a water system for 6 proposed lots meeting DWS standards pursuant to Rule 22-Water Variance and utilize current access and paved road upon "Easement 1" or other rights-of-way fronting subject TMK property 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.

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2. Pursuant to Department of Water Supply (DWS) memorandum dated July 23, 2008, the applicant or subdivider shall contact the DWS and designate in writing "which lot within the proposed subdivision will be assigned the one unit of water available" including any "Elevation Agreement" required by the DWS. Further, the subdivider or lot owner(s) of the designated lot assigned the DWS water service shall not "interconnect" or share the water service with any lots created by the subdivision without a water service and/or abutting TMK property(s).
3. The owner or applicant shall submit a drainage report for review by the DPW pursuant to DPW memorandum dated December 3, 2008 and address or satisfy DPW comments nos. 1, 2, and 3 dated December 3, 2008 prior to receipt of final subdivision approval of SUB 06-000467.
4. 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 06-000467. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting 6 proposed lots not serviced by a County water system, 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:
 - 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 06-000467. 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 proposed 6 lots or affected additional lots created by SUB 06-000467 not serviced by a County water system. No further subdivision of the lots created by SUB 06-000467 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
 - c. Any lots created by SUB 06-000467 may not be made subject to a condominium property regime.

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- d. Any dwelling constructed upon 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 upon a lot not serviced by a County water system 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 the lot(s) created by SUB 06-000467 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 06-000467, the owner(s) of the lot(s) created by SUB 06-000467 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

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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.

5. ROAD VARIANCE. The subdivider, owners, their assigns, or successors understand that the lots arising out of SUB 06-000467 will use and maintain the privately-owned road and/or easement/right-of-way fronting the proposed subdivision on their own without any expectation of governmental assistance to maintain the existing access or roadway improvements within and upon privately owned easements fronting subject TMK property or access and utility easement identified on the subdivisions preliminary plat map or any other necessary access and utility easement(s) within the proposed subdivision.

The applicant, 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 06-000467. The proposed lots shall participate with any current owners association or form a Homeowner or Road Association or include appropriate deed language, being covenants, conditions, and restrictions, which affect the entire property and/or proposed lots arising from the approval of the pending subdivision application and be duly recorded at the Bureau of Conveyances of the State of Hawaii by the Planning Department at the cost and expense of the applicant:

- a. The applicant and/or owner(s) shall indemnify and defend the State of Hawaii or County of Hawaii from any and all liability arising out of vehicular access to and from the subject property utilizing existing private utility and access easements.

Upon written demand of the County of Hawaii, the applicant and /or owners, their assigns, or successors shall agree to participate and pay their fair share percentage of any improvement district adopted for the purpose

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of roadway improvements serving the proposed lot(s) arising out of SUB 06-000467 or easements or rights-of-way fronting subject TMK property and/or SUB 06-000467. Should the improvement district require acquisition of any privately owned rights-of-way fronting proposed subdivision or portions of any lots arising out of SUB 06-000467, such rights-of-way shall be dedicated to the County without cost and the value of the dedication credited to the fair share contribution of the respective lot owner(s). 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 future lot owner(s) agree to participate in any road maintenance agreement or/and pay their fair share to maintain the privately-owned access and utility easement fronting proposed SUB 06-000467 and any necessary access and utility easement(s) created upon proposed SUB 06-000467.

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.

6. The subdivision application's (SUB 06-000467) final plat map shall meet all the requirements of the Hawaii County Zoning Code and the Subdivision Code not covered by this variance. No other variances from Chapter 23, Subdivisions, shall be granted to permit subdivision application-SUB 06-000467
7. No permit shall be granted to allow an "ohana" dwelling nor shall a building permit issued to allow construction of an "ohana" dwelling be granted to the subject TMK property or upon any lots created by SUB 06-000467 not issued a DWS service or meter, subject to provisions of the Zoning Code or State Law, which may change from time to time.
8. The subdivider, owner(s), their assigns or successors shall pay any outstanding

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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 subject Variance-VAR 08-042 null and void.

Thank you for your understanding and patience during our review.

Sincerely,



BJ LEITHEAD TODD
Planning Director

WRY:kwr
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xc: DPW-Engineering Branch
DWS-Engineering Branch
SUB 06-000467