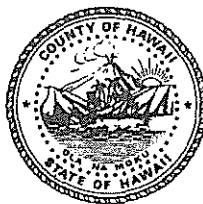


William P. Kenoi  
Mayor



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

October 28, 2009

David C. Bangert, Ph. D.  
519 C Keolu Drive  
Kailua, HI 967334

Dear Dr. Bangert:

**SUBJECT: VARIANCE-VAR 08-052**  
**Applicant: KULIA FARMS LLC**  
**Owner: KULIA FARMS LLC**  
**Request: Variance from Chapter 23, Subdivisions,**  
**Improvements Required**  
**Tax Map Key: 1-5-010:023, (SUB 07-000630)**

After reviewing your variance application, the Planning Director certifies the approval of Variance-VAR 08-052 subject to variance conditions. The variance permits proposed 6-lot subdivision (SUB 07-000630) of the above referenced TMK property to be created 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 variance from the subdivision's minimum water system requirements can be **approved** based on the following findings:

#### **BACKGROUND**

1. **Location.** The referenced TMK property, Lot 2 containing approximately 38 acres, being portion of Grant 1537 to Kapohano, and situated at Halona, Puna, Hawaii.
2. **Zoning.** The subject property is zoned Agricultural (A-5a) by the County and designated Agriculture or "A" by the State Land Use Commission (LUC).

3. **Subdivision Request/PPM.** The owner's or subdivider submitted a subdivision application (SUB 07-000630) and revised preliminary plat map (PPM) or "plot plan" proposing to subdivide subject TMK property into 6-lots. Further action on this subdivision application is being deferred according to letter dated October 2, 2008 in the subdivision file.

4. **Variance Application.** The applicant submitted the variance application including revised information received on April 7, 2009. The application includes a letter dated April 3, 2009 and states in part the following:

"Pursuant to that call, I am applying for a water variance under Rule 22 utilizing water catchment. According to the current atlas of Hawaii, Kulia Farms receives more than 60 inches of rain fall.

Please find enclosed five copies of the proposed plot plan showing the subdivision into six lots."

5. **Variance Application (VAR 08-052)-Agency Comments and Requirements:**

- a. The State of Hawaii-Department of Health (DOH) memorandum is dated May 12, 2009. Refer to DOH memorandum in variance file.

- b. The County of Hawaii-Hawaii Fire Department (HFD) memorandum dated May 14, 2009 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."

- c. The Department of Water Supply (DWS) memorandum, dated May 21, 2009 states in part:

"We have reviewed the subject application and have no objections as there is no public water system in the area."

6. **Notice to Surrounding Owners.** The applicant submitted copy of notice sent by to surrounding property owner(s) within 300 feet of subject TMK property by US Mail and USPS Certified Mail receipts dated May 11, 2009. Notice of this

application was published in the Hawaii Tribune Herald and West Hawaii Today on May 15, 2009.

**Posted Sign.** The applicant submitted an affidavit dated May 14, 2009 regarding sign posted on "lot" or subject TMK property and photograph or picture 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.

Therefore, after considering the applicant's variance application and variance background information including rainfall information, and agency comments, the Planning Director has determined that there are special or unusual circumstances applying to subject 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**

The DWS memorandum dated September 27, 2007 in subdivision file (SUB 07-000630) states in part the following:

"We have reviewed the subject application. There is no public water system in the area."

Pursuant to Chapter 23, Subdivisions, the first alternative requires the applicant or subdivider to provide or construct "A water system meeting the minimum requirements of the County department of water supply" including water mains, etc.

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, the requirement to construct a public water system or providing an approved alternative private water system meeting DWS standards for proposed 6-lot subdivision (SUB 07-000630) 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 and within the 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 variance" to permit 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 property provided by the applicant indicate that there is adequate rainfall to support individual or separate private rainwater catchment systems for potable and emergency uses for the proposed subdivision. The analysis or comparison between the applicant's submittals and GIS rainfall data maintained by Planning Department for this area indicates the proposed lots or subdivision will receive at least 60+ inches of rainfall annually. The proposed subdivision meets Rule No. 22-Water Variance.

The applicant's variance application was acknowledged by letter dated May 7, 2009. The applicant granted the Planning Director an extension of time to render decision on the variance application.

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 and the 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 application or variance request for a water variance pursuant to Rule 22 to allow proposed 6-lot subdivision of the subject TMK property without providing a water system meeting DWS requirements is **approved** subject to 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 07-000630. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting 6-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:
  - 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 07-000630. 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 07-000630 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
  - c. Any lots created by SUB 07-000630 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 and be located in an area accessible to fire apparatus. 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 07-000630 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 07-000630, the owner(s) of the lot(s) created by SUB 07-000630 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.
- g. 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.

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 subject Variance-VAR 08-052 null and void.

Sincerely,



BJ LEITHEAD TODD  
Planning Director

WRY:mad

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xc: Manager-DWS  
SUB 07-000630