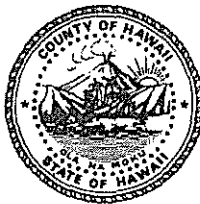


William P. Keno
Mayor



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

June 10, 2009

Mr. Greg Mooers
MOOERS ENTERPRISES, LLC
P.O. Box 1101
Kamuela, HI 96743

Dear Mr. Mooers:

SUBJECT: VARIANCE-VAR 08-056
Agent: MOOERS ENTERPRISES, LLC
Applicants: ANDRE ULRYCH, ET AL.
Owners: ANDRE ULRYCH, ET AL.
Request: Variance from Chapter 23, Subdivisions,
Article 6, Division 2, Improvements Required,
Section 23-84, Water Supply, (1)(2)
Tax Map Key: 5-3-007:047, (SUB 08-000748)

After reviewing the subject variance application, the Planning Director certifies the approval of Variance-VAR 08-056 subject to variance conditions. The variance permits proposed 5-lot subdivision (SUB 08-000748) 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 the request for variance from the minimum subdivision water system requirements be **approved** based on the following findings:

BACKGROUND

1. **Location.** The referenced TMK property, containing approximately 117.681 acres, Land Court Consolidation 216, Consolidation of Lot 8 as shown on Map 1; and, Exclusion 1, being a portion of Grant 2053 to Kahoe, is situated at

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Kukuiwaluhia, Apuakohau and Halelua, North Kohala, Hawaii.

2. **Zoning.** The subject TMK property is zoned Agricultural (A-20a) by the County and designated Agriculture "A" by the State Land Use Commission (LUC). The property is within the Special Management Area (SMA). However, the property does not abut the shoreline.
3. **Subdivision Request/PPM.** The applicant's agent filed a subdivision application (SUB 08-000748) including preliminary plat map (PPM), dated March 7, 2008 proposing to subdivide subject TMK property into 5-lots. Further action on the subdivision application is being deferred pursuant to letter dated May 30, 2008 in the subdivision file.
4. **Variance Application.** The applicant submitted the variance application and submittals on August 28, 2008. The application includes a background report (5 pages) prepared by the applicant's agent.

Page 1 of the agent's report states the following:

"The applicants request approval of a variance from Article 6, Division 2, Section 23-84 of Chapter 23, Subdivision Control Code under Rule 22."

Page 3 of the agent's report states the following:

"We believe that the most viable alternative to utilize this property under its present zoning designation is to use water catchment and storage systems to provide the necessary potable water to these lots. There is adequate rainfall, 60" annually, for effective water catchment systems for these lots."

5. **Variance Application (VAR 08-056)-Agency Comments and Requirements:**

- a. The County of Hawaii-Hawaii Fire Department (HFD) memorandum dated October 7, 2008 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."

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- b. The State of Hawaii-Department of Health (DOH) memorandum is dated September 25, 2008. Refer to SOH-DOH memorandum in variance file.
- c. The Department of Water Supply (DWS) memorandum, dated October 1, 2008, states in part:

“We have reviewed the subject application and our comments to you in our letter dated July 22, 2008, still stand.”

- 6. **Notice to Surrounding Owners.** The applicant’s forwarded copy of notice sent to surrounding property owner(s) within 300 feet of subject TMK property, and mailing receipt dated September 30, 2008. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on September 30, 2008.

Posted Sign. The applicant submitted an affidavit dated October 7, 2008 regarding sign posted upon subject TMK property and photograph or 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 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 July 22, 2008 in subdivision file (SUB 08-000748) 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

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proposed subdivision at this time. Extensive improvements and additions, which may include, but not limited to source, booster pumps, transmission, and distribution facilities, would be required. Currently, sufficient funding is not available from the Department for such improvements and no time schedule is set."

The first alternative requires the applicant or subdividers to make "extensive improvements and additions" to existing DWS-County of Hawaii water system or "existing water system facilities" to support proposed subdivision (SUB 08-000748) or the subdivider or owners can wait for the DWS to make improvements to the DWS system or "existing water system facilities" in accordance with the DWS memorandum dated July 22, 2008 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. The imposition of improving the existing public water system or providing an approved alternative private water system meeting DWS standards for proposed 5-lot subdivision (SUB 08-000748) 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 allow and utilize privately owned individual rain water catchment systems for proposed 5-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

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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 utilizing information provided by the applicant compared with rainfall data and rain gauge information maintained at the Planning Department indicates the subject TMK and properties “mauka” of subject TMK property receive adequate rainfall to support individual or separate private rainwater catchment systems for potable and emergency uses for lots created by proposed subdivision. The map extract submitted by the applicant compared with a Planning Department map or study showing the location of the nearest active rain gage indicates the subject TMK or proposed subdivision is situated near or “makai” of the 60-inch isohyet line or within an area generally receiving at least 60 inches of annual rainfall. The analysis of the applicant’s data compared with other published rainfall maps indicate the proposed subdivision is close to station “175.1” (Station name: Kohala Mission-Altitude of Gage (feet) “537”). Pursuant to other rainfall information maintained by the Hawaii State Climate Office (HSCO), the mean annual rainfall (1949-2000) for “175.1” was 63.61 inches. After comparing the applicant’s submittals with the study map and rainfall information maintained for older or abandoned rain stations or gages near the proposed subdivision, the Planning Director gives the applicant’s agent “the benefit of the doubt” that the subject TMK property or proposed subdivision and surrounding properties receive at least 60 inches +/- of rainfall annually. The analysis of the applicant’s submittals and information and isohyet map study for the general area including historical or annual rainfall data maintained by HSCO for an active rain gauge-“175.1” nearest the subject TMK property indicates the proposed 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 September 23, 2008 and additional time to review previous subdivision approvals near the proposed subdivision was necessary. The applicant’s agent granted the Planning Director an extension of time to render decision on agent’s variance application to no later than June 14, 2009.

Based on the foregoing findings, this variance request would be consistent with the general

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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 request to allow proposed 5-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. The applicant, owners, their assigns, or successor shall construct access and roadways from Akone Pule Highway to proposed subdivision-SUB 08-000748 in accordance with DPW memorandum dated November 19, 2008.
3. WATER VARIANCE: The owners, 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 08-000748. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting all lots created by subdivision application SUB 08-000748 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 08-000478. 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 08-000748 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.

- c. Any lots created by SUB 08-000748 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 08-000748 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 08-000748, the owner(s) of the lot(s) created by SUB 08-000748 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.

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- 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.
- 4. 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.
- 5. 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-VAR 08-056 null and void.

Sincerely,



BJ LEITHEAD TODD
Planning Director

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xc: Manager-DWS
SUB 08-000748