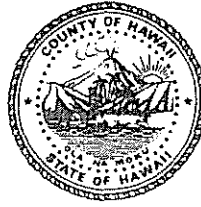


William P. Kenoi
Mayor



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

April 2, 2009

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

Dear Mr. Mooers:

SUBJECT: VARIANCE-VAR 08-058
Agent: MOOERS ENTERPRISES, LLC
Applicants: DAVID J. PATNO, ET AL.
Owners: DAVID J. PATNO, ET AL.
Request: Variance from Chapter 23, Subdivisions,
Article 6, Division 2, Improvements Required,
Section 23-84, Water Supply, (1)(2)
Tax Map Key: 5-8-001:017, (SUB 08-000763)

After reviewing the subject variance application, the Planning Director certifies the approval of Variance-VAR 08-058 subject to variance conditions. The variance permits proposed 2-lot subdivision (SUB 08-000763) 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 applicant's request or owner's variance application from minimum subdivision water system requirements for proposed 2-lot subdivision be **approved** based on the following findings:

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BACKGROUND

1. **Location.** The referenced TMK property, Lot 4 containing 44.836 acres, being a portion of Land Commission Award 7715, Apana 9 to Lota Kamehameha, is situated at Kauapalaoa, North Kohala, 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 owner's agent, on behalf of owners, filed a subdivision application (SUB 08-000783) including preliminary plat map (PPM), dated February 4, 2008, proposing to subdivide subject TMK property into 2-lots. Further action on the subdivision application is being deferred pursuant to letter dated June 27, 2008 in the subdivision file.

4. **Variance Application.** The applicant submitted the variance application and submittals on September 18, 2008. The application includes the following information in a transmittal letter dated September 15, 2008:

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

"The subject subdivision complies with the terms of 22-6 as the lot sizes average in excess of 20-acres; the lot sizes are four times the existing zoning of A-5a and the subdivision results in only two lots."

5. **Variance Application (VAR 08-058)-Agency Comments and Requirements:**

- a. The State of Hawaii-Department of Health (DOH) memorandum is dated September 25, 2008. Refer to DOH memorandum in variance file.
- b. The Hawaii Fire Department (HFD) memorandum dated October 7, 2008 states:

"In that the catchment 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."

Mr. Greg Mooers
MOOERS ENTERPRISES, LLC
Page 3
April 2, 2009

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

“We have reviewed the subject application and our comments to you in our letter dated June 23, 2008, still stand.”

6. **Notice to Surrounding Owners.** The applicant's submitted copy of notice sent by USPO to surrounding property owner(s) within 300 feet of subject TMK property, and mailing receipt dated September 28, 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 photographs or picture of the sign and picture of the posted sign upon subject TMK property.

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 agent's request for variance or owner'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 23, 2008 in subdivision file (SUB 08-000763) states in part the following:

“We have reviewed the subject application for the proposed subdivision.

Please be informed that there is no public water system in the area.”

The first alternative requires the applicant to construct a dedicable water supply system meeting the minimum requirements of the County of Hawaii-DWS.

Mr. Greg Mooers
MOOERS ENTERPRISES, LLC
Page 4
April 2, 2009

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 providing a public water system or providing an approved alternative private water system meeting DWS standards for proposed 2-lot subdivision (SUB 08-000783) 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 variance pursuant to Rule 22 to allow and utilize privately owned individual rain water catchment systems for proposed 2-lot subdivision (Lot 4-A: 24.836 acres and Lot 4-B: 20.000 acres) 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. However Rule 22-6, provides the following exception for large lot subdivisions:

"22-6 Exceptions for Large Lot Subdivisions.

Exceptions to the minimum rainfall requirement and the maximum number of lots (up to an absolute maximum of twenty lots) may be granted if the subdivision results in lots averaging at least twenty acres in size and averaging at least four times the minimum lot size allowed by zoning."

Mr. Greg Mooers
MOOERS ENTERPRISES, LLC
Page 5
April 2, 2009

The applicant or agent's transmittal letter dated September 15, 2008 states in part:

"The subject subdivision complies with the terms of 22-6 as the lot sizes average in excess of 20-acres; the lot sizes are four times the existing zoning of A-5a and the subdivision results in only two lots."

The subject TMK property or Lot 4 containing 44.836 acres is zoned A-5a, whereby, A-5a requires each proposed lot to have a minimum building site area of five (5) acres. The subdivider is proposing to subdivide the subject TMK property into 2 large lots. The subdivision application's PPM denotes proposed Lot 4-A is 24.836 acres and Lot 4-B is 20.000 acres which would result in a subdivision creating 2-lots which average at least four times the minimum lot size which qualifies for a water variance under Rule 22 or "22-6, Exceptions for Large Lot Subdivision". Therefore, the proposed 2-lot 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 agreed to extend the date on which the Planning Director shall render a decision on the subject variance to no later than April 10, 2009.

Based on the foregoing findings, the applicant or agent's request for variance would be consistent with the general purpose of the zoning district and the intents and purposes of the Zoning Code, Subdivision Code, 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 2-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 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 08-000763. This written agreement

Mr. Greg Mooers
MOOERS ENTERPRISES, LLC

Page 6

April 2, 2009

shall contain the following deed language, being covenants, conditions, and restrictions affecting 2-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 08-000763. 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 08-000763 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
- c. Any lots created by SUB 08-000763 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 08-000763 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 08-000763, the owner(s) of the lot(s) created by SUB 08-000763 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 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.

Mr. Greg Mooers
MOOERS ENTERPRISES, LLC

Page 8

April 2, 2009

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

WRY:mad

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xc: Manager-DWS
SUB 08-000763