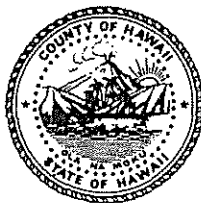


William P. Kenoi
Mayor



BJ Leithead Todd
Planning Director

County of Hawaii

PLANNING DEPARTMENT

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Phone (808) 961-8288 • Fax (808) 961-8742

March 18, 2009

Thomas L.H. Yeh, Esq.
TSUKAZAKI YEH & MOORE
85 W. Lanikaula Street
Hilo, HI 96720

Dear Mr. Yeh:

SUBJECT: VARIANCE-VAR 08-060

Agent: THOMAS L. H. YEH

Applicants: STEVEN GUTTMAN, ET AL.

Owners: STEVEN GUTTMAN, ET AL.

**Request: Variance from Chapter 23, Subdivisions,
Article 6, Division 2, Improvements Required,
Section 23-84, Water Supply, (1)(2)**

Tax Map Key: 4-3-014:006, (SUB 07-000601)

After reviewing your variance application, the Planning Director certifies the approval of Variance-VAR 08-080 subject to variance conditions. The variance permits proposed 2-lot subdivision (SUB 08-000601) without providing a water system for 1-lot meeting the 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 or owner's variance application from minimum subdivision water system requirements for proposed 3-lot subdivision be **approved** based on the following findings:

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BACKGROUND

1. **Location.** The subject TMK property, Lot 12 containing 13.468 acres, Hamakua Coffee Plantation, being portion of Lot 8, Grant 4434 to H. Louisson is situated at Paauilo Homesteads 2nd Series, Hamakua, 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 applicant or subdivider submitted a subdivision application (SUB 07-000601) including preliminary plat map dated May 7, 2007, proposing to subdivide subject TMK property into 2-lots. Further action on the subdivision application was deferred pursuant to Planning Department letter dated May 27, 2008.
4. **Variance Application.** The applicant submitted request for variance and variance application on September 28, 2008. This application includes background information or report (page 2) states in part the following:

"The Applicants propose to install and utilize a water catchment system to service Lot 12-B. Rainfall in the area is sufficient to provide water for any potential agricultural activities, as well as for domestic and firefighting purposes. The closest rain gauge to the Property is located in the town of Pa'auilo. According to the 2005 Hawai'i County Data Book, the annual rainfall in the town of Pa'auilo was 76.05 inches, 96.53 inches in 2002, 66.30 inches in 2003, 112.93 inches in 2004 and 89.58 inches in 2005. In addition to the annual rainfall levels measured at the Pa'auilo rain gauge, the Property lies in between an 80 inch annual rainfall area and a 120 inch annual rainfall area on the United States Geological Survey map included in the Water-Resources Investigations Report 95-4212 (see attached Exhibit 1)."

5. **Variance Application (VAR 08-060)-Agency Comments and Requirements:**
 - a. The State of Hawaii-Department of Health (DOH) memorandum is dated October 10, 2008. Refer to DOH memorandum in variance file.

- b. The County of Hawai'i-Hawai'i Fire Department (HFD) memorandum dated October 27, 2008 states:

"We have no comments to offer at this time in reference to the above-mentioned Variance application request.

- c. The County of Hawai'i-Department of Water Supply (DWS) forwarded 2-memorandums or requirements dated November 3, 2008 and November 10, 2008 in the variance file.

The November 3, 2008 DWS memorandum states in part:

"Our comments from our September 7, 2007, letter to you regarding Subdivision Application No. 07-000601 still stand. Please be informed that the applicant has informed the Department that the existing service to the subject parcel (Account No. 630-95800) will be assigned to proposed Lot No. 12-A in this subdivision and proposed Lot 12-B will be served via a private rainwater catchment system. Therefore, we have no objections to the subject variance application and granting final subdivision approval. The applicant shall be notified, through copy of this letter, that the existing meter shall not be shared with the other proposed lot."

The DWS memorandum dated November 10, 2008 states in part:

"This letter is to make a correction to our November 3, 2008, letter to you regarding the subject application. Please note that the account number stated in our letter should be change to 680-39350. The rest of our letter remains unchanged."

6. **Notice to Surrounding Owners.** The applicant's agent submitted declaration of mailing a notice and location map on October 14, 2008 to list of surrounding property owner(s) within 300 feet of subject TMK property "Exhibit B". Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on October 15, 2008.

Posted Sign. The applicant's agent submitted affidavit dated March 12, 2009 regarding a sign and photograph 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 applicant's variance application and variance background information, agency comments, and rainfall information and data maintained by the Planning Department, the Planning Director has determined that there are special or unusual circumstances applying to subject TMK property 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 7, 2007 in the subdivision file (SUB 07-000601) states in part the following:

"Please be informed that water is limited to one 5/8-inch meter and average of 400 gallons per day, which is subject to change without notice. Further, 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."

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. The imposition of improving the existing public water system or providing an approved alternative private water system meeting DWS standards for an additional lot created by subdivision (SUB 07-000601) 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 required for the proposed subdivision or applicant's request for variance "to utilize catchment water system for one lot" or allow and utilize privately owned individual rain water catchment systems for proposed "Lot 12-B" 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 applicant appears to cite rainfall data for rain gauge station "221.0" or station name "Paauilo" located at "Altitude of Gage" (feet) "800" according to 1994 DLNR report (Published 1996) located near the subject TMK property or proposed subdivision. The proposed subdivision is situated above or mauka of rain gage station- "221" (Paauilo) pursuant to 1994 map- Plate 6- WATER-RESOURCES INVESTIGATIONS REPORT 95-4212 (Published 1996).

The analysis and comparison of agent's background information compared with maps and other published reports at the Planning Department indicate there is adequate rainfall within the subject TMK property or surrounding areas to support the applicants or agent's request for variance to allow individual or separate private rainwater catchment systems for potable and emergency uses within proposed subdivision.

The map extract submitted by the applicant compared with an isohyet study map from Planning Department's GIS data base denotes subject TMK or proposed subdivision is situated between 2-80 inch isohyet lines at approximately 1800 feet above sea level and is near Station "221". Pursuant to rainfall information maintained by the Hawaii State Climate Office (HSCO), the mean annual rainfall (1949-2000) for "221" was 95.60 inches. The analysis of the applicant's information compared with an isohyet study map showing the subject TMK property and historical or annual rainfall data maintained by HSCO for a rain gage below and near the proposed subdivision indicates the subject TMK property or proposed subdivision receives more than 60+ inches of rainfall annually. The proposed subdivision meets Rule No. 22-Water Variance.

The applicant's variance application was acknowledged by letter dated October 2, 2008 and additional time to file additional information to complete the variance application and 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 March 20, 2009.

Based on the above findings and Rule No. 22, the applicant'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 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 a proposed 2-lot subdivision of the subject TMK property without providing a water system meeting DWS standards for 1-proposed lot 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 or subdivider shall confer with the DWS and designate in writing which proposed lot shall be assigned DWS water service (Account No. 680-39350) prior to submittal of approved written agreement and issuance of final subdivision approval to SUB 07-000601.

The DWS service (Account No. 680-39350) assigned to proposed lot or "Lot 12-A" created by SUB 07-000601 shall not be shared with proposed lot "Lot 12-B" created by SUB 07-000601 or any other abutting TMK property.

3. 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 07-000601. This written Agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting lot not serviced by a County water system or pending 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 owner(s) agree and accept the fact that a County dedicable public water system is not now able to service the proposed subdivision SUB 07-000601. 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 owner(s) agree and accept the fact that the County will not, at this time, bear the responsibility of supplying public water to the proposed or affected additional lot or proposed "Lot 12-B" created by SUB 07-000601 not serviced by a County water system. No further subdivision of the lots created by SUB 07-000601 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
 - c. Any lots created by SUB 07-000601 may not be made subject to a condominium property regime.
 - d. Any dwelling constructed on a proposed 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 the affected lot created by SUB 07-000601 that the County Water System has been upgraded or an improvement district initiated to enable service to the affected lot created by SUB 07-000601, the owner(s) of the affected lot created by SUB 07-000601 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

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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 Permit null and void.

Sincerely,



BJ LEITHEAD TODD
Planning Director

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xc: Manager-DWS
SUB 07-000601