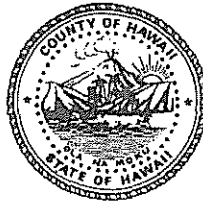


William P. Kenoi
Mayor



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

Pepeekeo Orchards 4, LLC
P.O. Box 969
Pepeekeo, HI 96783

Gentlemen:

SUBJECT: VARIANCE-VAR- 08-062
Applicant: PEPEEKEO ORCHARDS 4, LLC
Owner: PEPEEKEO ORCHARDS 4, LLC
Request: Variance from Chapter 23, Subdivisions,
Article 6, Division 2, Improvements Required,
Section 23-84, Water Supply, (1) (2)
Tax Map Key: 2-8-008:095, (SUB 08-000739)

After reviewing your variance application, the Planning Director certifies the approval of Variance-VAR 08-062 subject to variance conditions. The variance permits proposed 5-lot subdivision (SUB 08-000739) of the subject TMK property without providing water supply system to 2-proposed building lots meeting minimum requirements of the County-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 variance from the minimum subdivision water system requirements be **approved** based on the following findings:

BACKGROUND

1. **Location.** The referenced TMK property containing approximately 116.41 acres, being portion of R.R. 7192, L.C. Aw. 8559-B, Apana 17 and 18 to Wm. C. Lunailo, is situated at Makahanaloa, South Hilo, Hawaii.

NOV 03 2009

2. **Zoning.** The subject property is zoned Agricultural (A-20a) 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 08-000739) and preliminary plat map (PPM), dated March 12, 2008, proposing to subdivide subject TMK property into 4-building or agricultural lots and 1-road lot. Further action on the proposed subdivision is being deferred pursuant to letter dated August 21, 2008 in the subdivision application file.
4. **Variance Application.** The applicant submitted the variance application and submittals on October 8, 2008. Subsequent to receipt of additional information regarding the status of roadways, the variance application was acknowledged by letter dated July 17, 2009. The variance application includes the following background information which states in part the following:

"Request is made to grant water variances (sic) for two lots to be created by our subdivision application.

Of the five lots to be created by the proposed subdivision, one will be a roadway lot (Lot 83-Z-E). The other four will be agricultural lots. Of the four, Lots 83-Z-A and 83-Z-C will be assigned the two existing water units. It is proposed that the subdivision of Lot 83-Z-B and 83-Z-D be approved without approved water units as the Dept. of Water Supply does not have the capacity to accommodate the granting of any new units in the area at the current time.

To resolve the question of providing water for Lots 83-Z-B and 83-Z-D, it is proposed that these two lots be allowed to rely upon rain catchment systems for their water supply. The area seems to receive more than ample rainfall to support a water catchment system.

At the current time, there doesn't appear to be any other reasonable alternatives to provide water to these two lots. In the future, when the Dept. of Water Supply does develop their water resource in the area to provide them with the ability to grant new water units, it would seem appropriate to approve two new water units at that point in time for these two lots."

5. **Variance Application (VAR 08-062)-Agency Comments and Requirements:**

- a. The State of Hawaii Department of Health (DOH) memorandum is dated July 22, 2009. Refer to SOH-DOH memorandum in the variance application file.
- b. The County of Hawaii-Hawaii Fire Department (HFD) memorandum is dated July 27, 2009. Refer to the HFD memorandum in the variance application file.
- c. The Department of Water Supply (DWS) memorandum, dated August 10, 2009, states in part:

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

Although the applicant has stated an additional unit of water is available in the Subdivision Application, the Department has not received any documentation confirming it. Until such time, the applicant has one unit of water assigned to the subject parcel by the existing 5/8-inch meter (Account No. 490-14404), which is limited to an average daily usage of 400 gallons and suitable for only one single-family dwelling.

We have no objections to the applicant's proposed use of a private rainwater catchment system to service the additional lots.

Prior to final subdivision approval being granted, we request that the applicant designate, in writing, which proposed lot within the subdivision will be served by the existing meter for our records. Further, the applicant shall be informed that the existing meter shall not be shared with other proposed lots and the water system piping between the lots shall not be interconnected in any way."

6. **Notice to Surrounding Owners.** The applicant's forwarded copy of notice mailed to surrounding property owner(s), list of property owners within 300 feet of subject TMK property, and proof of mailing with affixed USPS receipts. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on July 26, 2009.

Posted Sign. The applicant submitted letter dated October 17, 2008 regarding sign posted upon subject TMK property and photograph 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 May 19, 2008 in subdivision file (SUB 08-000739) states in part the following:

"Although there is an existing service to Lot Z-A, water can be made available for Lot Z-C from an existing 6-inch waterline along Road Lot Z-E fronting the property. However, the Department's existing water system facilities cannot provide water to Lots Z-B and Z-D at this time. Extensive improvements and additions, including source, storage, transmission, booster pumps, and distribution facilities, must be constructed.

Subject to the above final subdivision approval is subject to the applicant complying with the following conditions:

1. Installation of a service lateral that will accommodate a 5/8-inch sized meter to Lot Z-C.
2. Submit construction plans and design calculations prepared by a professional engineer, architect, or land surveyor, registered in the State of Hawai'i, for review and approval.
3. Remit the prevailing facilities charge of \$5,500.00, which is subject to change.

For the applicant's information, water in this area is not available for future land applications."

Pursuant to the applicant's background information and review of DPW memorandums in the subdivision and variance files, it appears that the proposed subdivision is eligible to receive a service from the nearest County DWS system. The earlier DPW memorandum in the subdivision file requires the subdivider to make "extensive improvements and additions" to the nearest County of Hawaii-DWS water system for the proposed subdivision or additional lots created by the proposed subdivision. And, another or second alternative would be to design, drill and develop private wells and install the necessary water system improvements in accordance with DWS standards for the proposed subdivision.

In view of the above, there are no other reasonable alternatives in resolving the difficulty of the applicant. The imposition or requirement to make extensive improvements to the existing or nearest DWS water system or providing an approved alternative private water system meeting DWS standards for proposed subdivision (SUB 08-000739) or lots not eligible to receive a water service would be putting excessive demands upon the applicant or subdivider when other alternatives for proposed lots not serviced by a county water meter can be considered.

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 subdivision or lots without a DWS water service can meet the intent and purpose of the Subdivision Code; and, can be 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 of the applicant’s submittals and GIS rainfall data maintained by Planning Department and indicate the proposed subdivision will receive at least 60+ inches of rainfall annually. The proposed subdivision meets Rule No. 22-Water Variance.

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 request to allow proposed subdivision of the subject TMK property without providing a water system meeting DWS standards for lots not eligible to obtain a water service from the County-DWS 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. Pursuant to DWS memorandum dated August 10, 2009, the applicant/owner or subdivider shall contact the DWS in writing and assign “existing meter” to “proposed lot within the subdivision” or proposed subdivision (SUB 08-000739). The applicant or DWS shall identify and confirm “which proposed lot” or lot number is assigned “existing meter” and notify the Planning Department-Subdivision Section-SUB 07-000739, in writing, prior to issuance of final subdivision approval.

3. 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 08-000739. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting those lots without a DWS water service 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 08-000739. 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 08-000739 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
 - c. Any lots created by SUB 08-000739 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 08-000739 that the County Water System has been upgraded or an improvement district initiated to enable service to lots created by SUB 08-000739, the owner(s) of the lot(s) created by SUB 08-0739 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.
- 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.

Peppeekeo Orchards 4, LLC

Page 9

October 28, 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,

A handwritten signature in black ink, appearing to read "BJ Leithhead Todd". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

BJ LEITHEAD TODD

Planning Director

WRY:mad

P:\WP60\WRY\FORMLETT\VAR08-062\WATERRULE22.PO4LLC

xc: Manager-DWS
SUB 08-000739