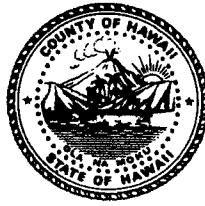


William P. Kenoi
Mayor



BJ Leithead Todd
Director

Margaret K. Masunaga
Deputy

County of Hawai'i

PLANNING DEPARTMENT

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July 30, 2009

Roy A. Vitousek, III, Esq.
CADES SCHUTTE LLP
75-170 Hualalai Road
Kailua-Kona, HI 96740

Dear Mr. Vitousek:

SUBJECT: VARIANCE-VAR 08-064

Applicant: ROY A. VITOUSEK III-CADES SCHUTTE LLP
Owners: EDWARD J. RAPOZA, ET AL.
Request: Variance from Chapter 23, Subdivisions,
Article 6, Division 2, Improvements Required,
Section 23-84, Water Supply, (1)(2)
Tax Map Key: 7-9-001:010, (SUB 08-000797)

After reviewing the subject variance application, the Planning Director certifies the approval of Variance-VAR 08-064 subject to variance conditions. The variance permits proposed 5-lot subdivision (SUB 08-064) 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 variance from minimum subdivision water system requirements can be **approved** based on the following findings:

BACKGROUND

1. **Location.** The referenced TMK property, Lot 13 containing approximately 1022.11 acres, being a portion of Grant 3155 to Henry N. Greenwell, is situated at Hokukano Tract, North Kona, Hawaii.

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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 owner(s) or subdivider submitted subdivision application (SUB 08-000797) and preliminary plat map (PPM) proposing to subdivide subject TMK property into 5-lots. Further action on subdivision application (SUB 08-000797) is being deferred according to letter dated October 14, 2008 in subdivision file.
4. **Variance Application.** The applicant submitted the variance application and submittals on October 23, 2008. The application includes background information and following statements on page 4:

"The Property is zoned Ag-20a (agricultural use with minimum lot size of 20 acres). The proposed subdivision is consistent with zoning for the Property. The proposed subdivision is consistent with Planning Department Rule 22 pertaining to water variances for water catchment use.

The proposed lots of 80+ acres exceed the minimum lot size for the Ag-20 zoning by more than four times and therefore meet requirements for a Large Lot Subdivision under Rule 22-6. The project is consistent with the intent and purpose of the Zoning and Subdivision Codes."

5. **Variance Application (VAR 08-064)-Agency Comments and Requirements:**

- a. The County of Hawaii-Hawaii Fire Department (HFD) memorandum dated December 3, 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."
- b. The State of Hawaii-Department of Health (DOH) memorandum is dated November 26, 2008. Refer to DOH memorandum in variance file.
- c. The Department of Water Supply (DWS) memorandum, dated December 12, 2008, states in part:

“We have reviewed the subject application and our comments from our October 21, 2008 letter to you still stand. For your information, the nearest adequate point of connection to the Department’s existing water system is from an existing 8-inch waterline within Mamalahoa Highway, approximately 5.5 miles from the subject parcel.”

6. **Notice to Surrounding Owners.** The applicant submitted an affidavit dated November 25, 2008 and copy of notice, dated November 25, 2008 mailed to surrounding property owner(s) within 300 feet of subject TMK property. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on November 28, 2008.

Posted Sign. The applicant submitted an affidavit dated November 5, 2008 regarding sign posted on 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 October 21, 2008 in subdivision file (SUB 08-000797) states in part the following:

“Please be informed that the property is not within the pressure service limits of the Department’s existing water system facilities. Therefore, the system cannot support the proposed subdivision at this time. Extensive improvements and additions, including source, storage, transmission, booster pumps, and distribution facilities, must be considered.

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The first alternative requires the owner(s) or subdivider to consider improving the nearest County DWS water facility to service the proposed 5-lot subdivision or constructing dedicable water supply system for proposed 5-lot subdivision.

The second alternative would be to design, drill and develop private wells and construct a privately owned water system improvements in accordance with DWS standards.

The applicant's background information states in part:

Page 2. "There is a Hokukano Ranch water system that currently provides water to the parcel. The Owners will have the right to tie into and take water from the ranch water system. However, it does not appear that the ranch water system currently meets the minimum requirements of the County department of water supply pursuant to the Zoning Code, § 23-84 so the Owners are requesting this variance."

Page 4. "The cost of installing a private water system to serve the proposed lots created by subdivision would be prohibitively expensive to serve only five lots. The existing County water ends at Mamalahoa Highway, approximately 6 miles makai of the Property. Without a water variance, the Owners will be deprived of their rights to subdivide and convey the property according to their proportionate interest in the Property."

In view of the above, there are no other reasonable alternatives in resolving the difficulty of the applicant. The imposition of constructing a public water system or providing an approved alternative private water system meeting DWS standards for proposed subdivision (SUB 08-000797) would be putting excessive demands upon the owners or subdivider 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 applicant submitted a variance application or request for variance "pursuant to Planning Department Rule 22-6, Exceptions for Large Lot Subdivisions" to allow privately owned individual rain water catchment systems for proposed building lots created by the proposed subdivision. Generally, Rule 22, Water Variance, which became effective on February 25, 2006, is both a rule and statement of criteria to be used so that consistent decisions can be made on variance applications requesting variance from minimum subdivision water supply for a proposed subdivision pursuant to Section 23-84 of Chapter 23 of the County Subdivision Code. Rule 22, Water Variance, limits subdivisions requesting a variance from water supply 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. In addition, Rule 22, states in part:

"22-6 Exceptions for Large Lot Subdivisions.

Exceptions to the minimum rainfall requirement and the maximum number of lots (up to absolute maximum of twenty lots) may be granted if the subdivision results in lots averaging 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."

In view of the applicant's variance application, background information, and other circumstances, variance from the proposed subdivision minimum water supply requirements can be permitted pursuant to Rule No. 22-Water Variance, 22-6, Exceptions for Large Lot Subdivisions, subject to variance conditions.

The applicant's variance application was acknowledged by letter dated November 18, 2008. Additional time to review agency comments and other subdivisions near proposed subdivision (SUB 08-000797) was necessary. The applicant or owner(s) granted the Planning Director an extension of time to render decision on Variance Application-VAR 08-064 to on or before July 31, 2009.

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 5-lot subdivision (SUB 08-000797) of the subject TMK property(s) without providing a water system meeting DWS standards is **approved** pursuant to Rule 22, Water Variance, and 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 08-000797
3. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting 5-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 08-000797. 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 08-000797 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
 - c. Any lots created by SUB 08-000797 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 08-000797 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 08-000797, the owner(s) of the lot(s) created by SUB 08-000797 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

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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 the subject Variance Permit null and void.

Sincerely,



BJ LEITHEAD TODD
Planning Director

WRY:mad

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xc: Manager-DWS
SUB 08-000797