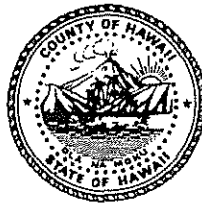


William P. Kenoi
Mayor



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

May 29, 2009

Sandra P. Song, Esq.
Sandra P. Song, Attorney at Law
10 Kamehameha Avenue
Hilo, HI 96720

Dear Ms. Song:

SUBJECT: VARIANCE-VAR 08-073
Representative: SANDRA P. SONG, Attorney at Law
Owners: DARYL L. SMITH, ET AL.
Request: Variance from Chapter 23, Subdivisions,
Article 6, Division 2, Improvements Required,
Section 23-84, Water Supply, (1)(2)
Tax Map Key: 1-1-006:102, (SUB 07-000514)

After reviewing your variance application, the Planning Director certifies the approval of Variance-VAR 08-073 subject to variance conditions. The variance permits proposed 2-lot subdivision (SUB 07-000514) 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 the minimum subdivision water system requirements be **approved** based on the following findings:

BACKGROUND

1. **Location.** The above referenced TMK property, Lot 10 containing approximately 42,237 square feet, is within Block B of the Ikina Moana Tract being a portion of R.P. 7223, L.C. Aw. 8559-B, Apana 16 to W.C. Lunalilo, and situated at Olaa, Puna, Hawaii. The property's street address is 11-2972 Lanihuli Road.

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2. **Zoning.** The subject property is zoned Single-Family Residential (RS-20) by the County and designated Urban "U" by the State Land Use Commission (LUC).
3. **Subdivision Request/PPM.** The owners or subdividers submitted subdivision application and preliminary plat map (PPM), February 2, 2005, proposing to subdivide subject TMK property into 2-lots. Further action on subdivision application (SUB 07-000514) is being deferred pursuant to letter dated June 6, 2007 in the subdivision file.
4. **Variance Application.** The applicant's representative submitted a variance application and submittals on December 12, 2008. The variance application includes background information, rainfall data, and other exhibits. The background information states in part:

Page 1. "The Property, which is a long, narrow lot, fronts Lanihuli Road for a distance of 108 feet, and has a depth of 390 feet. An existing single-family house approximately 1,048 in area (sic) constructed in 1974, and a detached shed approximately 280 square feet in area, constructed in 1974, are located in the front portion of the Property proposed for Lot 10-A of the two-lot subdivision. (See Plot Plan, Exhibit 2 attached hereto)."

Page 2-3. "Section 23-84 of the Hawaii County Code requires that a subdivider install a water system for the subdivision of land which complies with the requirements of the County public water system. However, there is no County water system in the Volcano area in the immediate vicinity of the Property; nor is there any proposal by the County Department of Water Supply to provide adequate water service within this area deprives the owners of their property rights if they are unable to subdivide this Property.

Water to all of the developed lots in the Volcano is provided by means of individual water catchment systems. Water catchment has been the means of providing water to the existing single-family dwelling unit on the Property, and the Applicant proposes that each subdivided lot utilizes a water catchment system.

The rainfall data supports the use of water catchment for this area.

The normal annual rainfall measured at the rainfall station closest to the Property, the U.S. Department of Commerce National Oceanic & Atmospheric

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Administration ("NOAA") rainfall station 511303/99999, Hawaii Volcano National Park Headquarters No. 54 is 108.96 inches, with the annual rainfall for the period from 1978 through 2007 ranging from a low of 78.84 inches to a high of 132.71 inches. (See Exhibit 3)."

5. **Variance Application (VAR 08-073)-Agency Comments and Requirements:**

a. The State of Hawaii-Department of Health (DOH) memorandum is dated February 10, 2009. Refer to DOH memorandum in variance file.

b. The County of Hawaii-Fire Department (HFD) memorandum dated February 19, 2009 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 protection."

c. The Department of Water Supply (DWS) memorandum, dated February 27, 2009, states in part:

"We have reviewed the subject application and our comments from our March 16, 2007, memorandum to your office still stand.

We have no objection to the subject application as the applicant has indicated that water will be provided via private rainwater catchment systems for each lot."

6. **Notice to Surrounding Owners.** The owner's representative submitted an affidavit dated February 13, 2009 regarding mailing of notice, list of surrounding property owner(s) within 300 feet of subject TMK property, and copy of notice "mailed" or sent to list of surrounding property owners. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on February 11, 2009.

Posted Sign. The owner's representative or owner(s) submitted an affidavit dated February 17, 2009 regarding sign posted upon subject TMK property and photograph of a posted sign.

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7. **Comments from Surrounding Property Owners or Public.** No other agency comments were received. The following objection letters were received:

- 7a. Letter(s) dated January 25, 2009 and April 15, 2009 from Vicki Taylor (TMK: (3) 1-1-006:069) objecting to the variance request and/or variance application(s) regarding proposed subdivision.

Therefore, after considering the variance application and background information submitted by the owner's representative, agency comments, comments from a surrounding property owner, and other similar variances from water supply granted in the immediate area, 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 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 March 16, 2007 in subdivision file (SUB 07-000514) states in part the following:

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

The first alternative requires the applicant or owners to construct "a water system meeting the minimum requirements of the Department of Water Supply" including water mains and fire hydrants, etc. pursuant to DWS rules and regulations (water system in accordance Chapter 23, Subdivisions.

The second alternative would be to design, drill and develop private wells and construct a water system meeting DWS standards.

In view of the above, there are no other reasonable alternatives in resolving the difficulty of the subdividers or owners. The imposition or requirement constructing a "public" or dedicable DWS water system or alternative private water system meeting DWS standards for the proposed 2-lot subdivision (SUB 07-000514) or additional lot would be putting excessive demands upon the owners when a more reasonable alternative is available.

INTENT AND PURPOSE-WATER VARIANCE

The intent and purpose of requiring a water system for and within a proposed subdivision is to

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assure that adequate water within the 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 representative or owner's agent to allow and utilize privately owned "individual water catchment systems" for the proposed subdivision or proposed additional lot can meet the intent and purpose of the Subdivision Code. Although Planning Department Rule 22, Water Variance, which went into effect on February 25, 2006, only applies to requests for subdivisions that propose to rely on rain catchment for their water supply, on agriculturally-zoned property, its criteria can be used to evaluate the owner's or representative's request for variance from water supply. Generally, Rule 22, Water Variance is both a rule and statement of criteria to be used so that consistent decisions can be made on water variance requests from Section 23-84 of the Subdivision Code. Rule 22, Water Variance, 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.

"22-5 Maximum Number of Lots

Except as provided in Rule 22-6, no more than six lots shall be allowed in a catchment subdivision."

In this case, the proposed subdivision is zoned Single-Family Residential (RS-20) and Section 23-84 of the Subdivision Code requires a water supply system for the additional lot. The proposed 2-lot subdivision is geographically located in an area which receives more than 60 inches of annual rainfall and does not exceed the maximum "six lots".

Therefore, after reviewing and comparing information submitted by the applicant with rainfall maps and other rainfall data maintained by other government agencies, the subject TMK property receives approximately 120 inches of annual rainfall to support individual or separate private rainwater catchments systems for potable and emergency uses for the proposed subdivision. According to current rainfall information submitted by the representative and data available from

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the National Oceanic & Atmospheric Administration (NOAA) the proposed subdivision is nearest rain gage station "54" situated at Hawaii Volcano National Park HQ approximately a mile (west) of the subject TMK property. According to NOAA rainfall data, the annual rainfall for "54" during 2004 was 111.81 inches. The analysis of the applicant's submittals compared with NOAA rainfall data for "54" and Hawaii State Climate Office (HSCO) the mean annual rainfall data or records for "54" for years 1949-2000 indicate the subject TMK property or proposed subdivision and surrounding areas receive more than 100 + inches of rainfall annually.

Given the property's zoning and other circumstances regarding building density, the owners or representative's request for variance from the water supply to permit proposed subdivision is reasonable. The proposed subdivision will create 2-building lots meeting minimum 20,000 square feet lot size requirement. The provisions for water storage, water distribution, and construction of private rain water catchment system(s) for the subdivision or additional building lot created by proposed 2-lot subdivision will be addressed by current or future owner(s).

The request for variance and variance application was acknowledged by letter dated February 4, 2009 and additional time was required by the Planning Department to consider comments from a neighbor or surrounding property owner. The owner's representative granted the Planning Director an extension of time to May 29, 2009 to render a decision on the variance application.

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 application to allow proposed 2-lot subdivision of subject TMK property without providing a water system meeting DWS standards is **approved** 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 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 07-000514. This written agreement 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 07-000514. 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 07-000514 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
- c. Any lots created by SUB 07-000514 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 07-000514 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 07-000514, the owner(s) of the lot(s) created by SUB 07-000514 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. No permit shall be granted to allow an ohana dwelling or building permit issued to allow construction of an "ohana" dwelling shall be granted to subject TMK property and/or upon lots created by proposed subdivision application (SUB 07-000514), subject to provisions of the Zoning Code or State Law which may change from time to time.
- 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.

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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 07-073 null and void.

Sincerely,



BJ LEITHEAD TODD
Planning Director

WRY/BJLT:mad
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xc: Manager-DWS
SUB 07-000514
Vicki Taylor