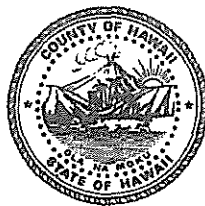


William P. Kenoi
Mayor



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

June 8, 2009

Mr. Craig Lindner
WAIKAHE ORCHARDS, LLC
P. O. Box 5508
Hilo, HI 96720

Dear Mr. Lindner:

SUBJECT: VARIANCE-VAR 09-005

Applicant: CRAIG LINDNER/WAIKAHE ORCHARDS, LLC

Owner: CRAIG LINDNER/WAIKAHE ORCHARDS, LLC

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

Tax Map Key: 2-4-071:010, (SUB 08-000808)

After reviewing your variance application, the Planning Director certifies the approval of Variance-VAR 09-005 subject to variance conditions. The variance permits proposed 6-lot subdivision (SUB 08-000808) of the above referenced TMK property without providing a water supply system 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 34.74 acres, being portions of Grant S-15256 to Peter K. Mehau, Jr. (Lot 1, Section "B", Waiakea Homesteads, Third Series) and portions of Grant S-15550 to Puna

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Shores, Inc. (Abandoned Roadway-Portion of Young Road), is situated at Kaiwiki 3rd. Homesteads, Waiakea, South Hilo, Hawaii.

2. **Zoning.** The subject property is zoned Agricultural (A-3a) 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 08-000808) and preliminary plat map (PPM), dated July 24, 2008, proposing to subdivide subject TMK property into 6-lots. Further action on the proposed subdivision is being deferred pursuant to letter dated February 23, 2009 in the subdivision file.
4. **Variance Application.** The applicant submitted the variance application and submittals on February 6, 2009. The applicant's background report includes rainfall information and states in part the following:

Page 2.

"The Department of Water Supply (DWS) memorandum dated November 19, 2008 states in part:

"The Department's existing water system facilities cannot support the proposed subdivision at this time. Extensive improvements and additions, including storage, transmission, booster pump and distribution facilities, must be constructed."

The developer is aware of the above restriction and will apply for a variance from water requirements immediately."

Page 4.

"The analysis of published public information and calculations submitted herewith appear to indicate that there is adequate rainfall within the subject property to support a private roof water catchment system for potable uses."

5. **Variance Application (VAR 09-005)-Agency Comments and Requirements:**
 - a. The State of Hawaii Department of Health (DOH) memorandum is dated

February 25, 2009. Refer to SOH-DOH memorandum in variance file.

- b. The County of Hawaii-Fire Department (HFD) memorandum is February 27, 2009. Refer to the HFD memorandum in variance file.
- c. The Department of Water Supply (DWS) memorandum, dated March 16, 2009, states in part:

“We have reviewed the subject application and our comments from our November 19, 2008, (sic) letter regarding the subject subdivision application still stand. However, we have no objection to the proposed Variance Application as the applicant has indicated that water service will be provided via a private rainwater catchment system for each lot.”

- 6. **Notice to Surrounding Owners.** The applicant submitted letter dated May 12, 2009 and copy of notice mailed to a list of surrounding property owner(s) within 300 feet of subject TMK property, and mailing receipt dated May 11, 2009. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on March 2, 2009.

Posted Sign. The applicant submitted an affidavit dated May 7, 2009 regarding a 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, variance background 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 November 19, 2008 in subdivision file (SUB 08-000808) states in part the following:

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“Please be informed that the property is not within the service limits of the Department’s existing water system facilities.

Subject to the above, the Department’s existing water system facilities cannot support the proposed subdivision at this time. Extensive improvement and additions, including, storage, transmission, booster pumps, and distribution facilities, must be constructed.

The developer is aware of the above restriction and will apply for a variance from water requirements immediately.”

The first alternative requires the applicant or developer to construct a water system meeting the minimum requirements of the County department of water supply or improving the nearest County DWS water system.

The second alternative would be to design, drill and develop private wells and install the necessary water system improvements in accordance with DWS standards.

The applicant’s background report (page 4) states: “The development cost per lot for the water system design and construction of an approved dedicable or acceptable private water system is cost prohibitive.”

In view of the above, there are no other reasonable alternatives in resolving the difficulty of the applicant. The imposition of constructing or improving the nearest public water system or providing an approved alternative private water system meeting DWS standards for proposed 6-lot subdivision (SUB 08-000808) 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 a 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 to allow “private roof water

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catchment system for potable uses” or utilize privately owned individual rain water catchment systems for proposed 6-lot subdivision 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 analysis of annual rainfall information and data submitted by the applicant compared with rainfall maps and other information at the Planning Department indicates that the subject TMK property and surrounding areas receive adequate rainfall to support private rainwater catchment systems for potable and emergency uses. The applicant’s rainfall information compared with an isohyet study map utilizing Planning Department’s GIS data base denotes subject TMK or proposed subdivision is situated between the 120 and 160 inch isohyet lines. According to rainfall data and background information submitted by the applicant, the proposed 6-lot subdivision is near active rain gauge “KEAAU 92”; and, according to Hawaii State Climate Office (HSCO) historical rainfall information, the mean annual rainfall for “KEAAU 92” (Years: 1963-2000) was 138.92 inches. The analysis of a Planning Department’s isohyet map study map and information provided by the applicant and historical or annual rainfall data maintained by HSCO for an active rain gauge “KEAAU 92” near subject TMK property indicates the proposed subdivision will receive at least 60+ inches of rainfall annually. The proposed subdivision meets Rule No. 22-Water Variance.

The applicant’s variance application-VAR 09-005 was acknowledged by letter dated February 20, 2009 and additional time was requested by the applicant to submit a sign affidavit, photograph of the posted sign, and proof of mailing notice to surrounding property owners. The applicant granted the Planning Director an extension of time to render decision on the variance application to June 10, 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 application and request to allow proposed 6-lot subdivision of the 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 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 08-000808. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting the buildable lots created by subdivision application 08-000808; 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 08-000808. 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 08-000808 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
 - c. Any lots created by SUB 08-000808 may not be made subject to a condominium property regime.

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- 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 08-000808 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 08-000808, the owner(s) of the lot(s) created by SUB 08-000808 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

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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.

Should any of the foregoing stated conditions not be complied with, the Planning Director may proceed to declare the subject variance-VAR-09-005 null and void.

Sincerely,



BJ LEITHEAD TODD
Planning Director

WRY:mad

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xc: Manager-DWS
SUB 08-000808