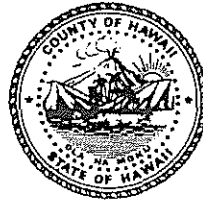


William P. Kenoi  
Mayor



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

April 28, 2010

Ms. Evon Avis  
P. O. Box 752  
Mountain View, HI 96771

Dear Ms. Avis:

**SUBJECT: VARIANCE-VAR 09-006**  
**Applicant: EVON AVIS**  
**Owners: DENNIS W. DIAS, ET AL.**  
**Request: Variance from Chapter 23, Subdivisions,**  
**Article 6, Division 2, Improvements Required,**  
**Section 23-84, Water Supply, (1) (2)**  
**Tax Map Key: 1-8-011:027, (SUB 08-000773)**

After reviewing your variance application, the Planning Director certifies the approval of Variance-VAR 09-006 subject to variance conditions. The variance permits proposed subdivision (SUB 08-000773) of above referenced TMK property without providing water supply system meeting minimum requirements of the County of Hawai'i Department of Water Supply. 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 a variance from the minimum water supply system required for proposed subdivision can be **approved** based on the following findings:

#### **BACKGROUND**

1. **Location.** The referenced TMK property or Lot 99 containing 50.00 acres, Olaa New Tract Lots, Grant No. 6228 to Nikolas Holoway, is situated at Puna, Hawai'i.
2. **Zoning.** The subject property is zoned Agricultural (A-5a) by the County and designated Agriculture "A" by the State Land Use Commission (LUC).

**APR 30 2010**

3. **Subdivision Request/PPM.** The applicant's agent filed subdivision application (SUB 08-000773) and preliminary plat map (PPM) proposing to subdivide subject TMK property into 6-lots. Further action on the proposed subdivision application is being deferred pursuant to letter dated July 25, 2008 in the subdivision file.
4. **Variance Application.** The applicant submitted the variance application and submittals on March 3, 2009. The application includes transmittal letter dated February 23, 2009 and attachments including other referenced submittals which state in part the following:

"(3) A copy of the three page fax sent to me by Kevin R. Kodama, Senior Service Hydrologist from NOAA, in Honolulu, HI. He states that the mean annual rainfall at the Kurtistown Station is greater than 157.5 inches. Following those pages is a printout of the Kurtistown Station 91.14, taken from the NOAA website. Those documents should satisfy your request for background information showing that our project in Glenwood receives in excess of 60 inches of annual rainfall."

5. **Variance Application (VAR 09-006)-Agency Comments and Requirements :**
  - a. The State of Hawaii Department of Health (DOH) memorandum is dated December 2, 2009. Refer to SOH-DOH memorandum in variance application file.
  - b. The County of Hawaii-Hawaii Fire Department (HFD) memorandum is dated December 10, 2009. Refer to HFD memorandum in variance application file.
  - c. The Department of Water Supply (DWS) memorandum, dated December 23, 2009, states in part:

"We have reviewed subject application and our comments from our August 25, 2008 memorandum to your office, regarding the subject subdivision, still stand.

The Departments will note that applicant has not indicated how water will be provided for the subject subdivision. Please be informed that we have no objection to water being provided via a private rainwater catchment system for each lot."

6. **Notice to Surrounding Owners.** The applicant submitted an affidavit dated February 22, 2010 regarding notice sent or mailed to surrounding property owner(s) within 300 feet of subject TMK property. According to the affidavit, a notice was mailed to surrounding property owners on or about December 21, 2009 from "Pahoa 96778". Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on December 8, 2009.

**Posted Sign.** The applicant submitted an affidavit dated February 22, 2010 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 circumstances and variance background information, rainfall information provided by the applicant, agency comments, and other comments from a surrounding property owner, the Planning Director has determined that there are special or unusual circumstances applying to the 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 August 25, 2008 in the subdivision file (SUB 08-000773) states in part the following:

"We have reviewed the subject application for the proposed subdivision.

Please be informed that the subject property is not within the service limits of the Department's existing water system facilities. The nearest point of connection is from an existing 4-inch waterline within Volcano Highway approximately 3.5 miles away.

Further, the Department's existing water system facilities cannot support the proposed subdivision at this time. Extensive improvements and additions, which may include, but not be limited to, source, storage, booster pumps, transmission, and distribution facilities, would be required. Currently, sufficient funding is not available from the Department for

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such improvements and no time schedule is set.”

The first alternative requires the applicant to provide or construct “Extensive improvements and additions” to the nearest DWS system or construct a water system meeting the minimum requirements of the DWS or County Subdivision Code.

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

In consideration of the DWS memorandum in the subdivision application file and letter dated January 6, 2009, the subdivider or owners are essentially required to construct a water system meeting DWS standards for the proposed 6-lot subdivision pursuant to the County Subdivision Code. The letter dated January 6, 2009 also tells the subdivider to apply or file “a variance from Article 6, Division 2, Section 23-84 of Chapter 23 (Subdivision) of the County Codes” and includes a copy of Rule 22, Water Variance for applicant’s consideration and use.

In view of the above, there are no other reasonable alternatives in resolving the difficulty of the applicant or subdivider. The requirement to improve the nearest DWS water system or construct a dedicable water system or approved alternative private water system meeting DWS standards to permit proposed 6-lot subdivision (SUB 08-000773) would be putting excessive demands upon the applicant or subdivider when a more reasonable alternative is available to the applicant or subdivider pursuant to Rule 22-Water Variance.

#### **INTENT AND PURPOSE-WATER VARIANCE**

The intent and purpose of requiring a water system for and within 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 utilize privately owned individual rain water catchment systems for proposed 6-lot subdivision can meet the intent and purpose of the Subdivision Code according 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

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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 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 variance information and rainfall data submitted by the applicant indicates the subject TMK property and surrounding areas receive adequate rainfall to support individual or separate private rainwater catchment systems for potable and emergency uses. The information submitted by the applicant compared with isohyet maps in the Planning Department denote the subject TMK and surrounding areas receive 120 inches + of annual rainfall. The analysis of the rainfall information submitted by the applicant compared with rainfall data and maps in the Planning Department indicate the proposed 6-lot subdivision will receive more than 60 inches of rainfall annually. The proposed subdivision meets Rule No. 22-Water Variance.

The variance application filed by the applicant was acknowledged by letter dated November 30, 2009 by the Planning Department and additional time was required by the applicant to file a sign affidavit and submit other submittals to complete the application. The applicant granted the Planning Director additional time to render decision on the variance application to April 30, 2010.

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 applicant's variance application to permit subdivision of the subject TMK property into 6-lots 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(s), 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 08-000773. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting proposed subdivision not serviced by a County water system or proposed 6-lots created by subdivision application (SUB 08-000773) 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 owners agree and accept the fact that a County dedicable public water system is not now able to service proposed subdivision SUB 08-000773. 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 owners agree and accept the fact that the County will not, at this time, bear the responsibility of supplying public water to proposed subdivision or any lots created by SUB 08-000773 not serviced by a County water system. No further subdivision of lots created by SUB 08-000773 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
  - c. Any lots created by SUB 08-000773 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 lot(s) created by SUB 08-000773 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 08-000773, the owner(s) of the lot(s) created by SUB 08-000773 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 Hawai'i 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 Hawai'i County Zoning Code and the Subdivision Code not covered by this variance. No other variance from Chapter 23, Subdivisions, shall be granted to permit subdivision application SUB 08-000773.

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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 Variance-VAR 09-006 null and void.

Sincerely,



BJ LEITHEAD TODD  
Planning Director

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xc: Manager-DWS  
SUB 08-000773