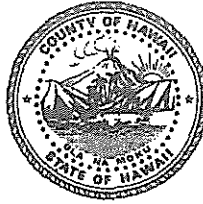


William P. Kenoi
Mayor



BJ Leithead Todd
Director

Margaret K. Masunaga
Deputy

County of Hawai'i

PLANNING DEPARTMENT

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July 13, 2009

Steven S. C. Lim, Esq.
CARLSMITH BALL LLP
121 Waiuanuenue Avenue
Hilo, HI 96720

Dear Mr. Lim:

SUBJECT: VARIANCE-VAR 09-009

Applicant: STEVEN S.C. LIM, ESQ

Owners: GREG NELSON, ET AL.

**Request: Variance from Chapter 23, Subdivisions,
Improvements Required**

Tax Map Key: 9-4-005:004, (SUB 09-000864)

After reviewing the subject variance application, the Planning Director certifies the approval of Variance-VAR 09-009 subject to variance conditions. The variance permits proposed 2-lot subdivision (SUB 09-000864) to be created without providing a water system meeting 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 application from the minimum subdivision water system requirements be **approved** based on the following findings:

BACKGROUND

1. **Location.** The referenced TMK property, containing approximately 40.261 acres, being Lot 9-A of Kiolakaa-Keaa Homesteads Lots (Registered Map No. 2176), being the Whole of Grant 7996 to M. P. Lorenzo, is situated at Puueo, Kau, Island and County of 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 applicant or subdivider submitted a subdivision application (SUB 09-000864) and revised preliminary plat map (PPM) proposing to subdivide subject TMK property into 2-lots. Further action on the subdivision application is being deferred pursuant to letter dated April 24, 2009 in the subdivision file.
4. **Variance Application.** The applicant submitted a variance application requesting variance from water supply to permit 2-lot subdivision on March 10, 2009. The variance application submittals include background information or report (March, 2009) consisting of 6 pages and referenced exhibits and maps regarding status of uses and buildings constructed upon the property and rainfall information including unusual circumstances regarding proposed 2-lot subdivision.
5. **Variance Application-VAR 09-009-Agency Comments and Requirements:**
 - a. The State of Hawaii Department of Health (DOH) memorandum is dated May 12, 2009. Refer to DOH memorandum in variance file.
 - b. The Hawaii Fire Department (HFD) memorandum dated May 15, 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 connection."
 - c. The Department of Water Supply (DWS) memorandum, dated May 21, 2009, states in part:

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

Although the applicant has indicated that the existing service to the subject parcel (Account No. 950-07362) will remain designated to the "Lamb" residence, the Department explicitly indicate in writing which lot number

within the subject subdivision will be designated with the existing service. Upon receipt of a letter designating the existing service, we will provide our recommendation for final subdivision approval.

We have no objection to the applicant's proposed use of a private rainwater catchment system to serve one of the lots within the proposed 2-lot subdivision. However, the applicant will be informed through a copy of this letter that both lots shall not share the existing meter in any way."

6. **Notice to Surrounding Owners.** The applicant submitted copy of notice sent to surrounding property owner(s) within 300 feet of subject TMK property and affidavit dated May 15, 2009 indicating notice was mailed to surrounding property owners on May 12, 2009. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on May 15, 2009.

Posted Sign. The applicant submitted an affidavit dated April 14, 2009 regarding signs posted upon subject TMK property and photograph of the posted signs.

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 4, 2009 in subdivision file (SUB 09-000864) states in part the following:

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

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Should the applicant proceed with a Variance Application and subsequent approval, we request in writing which lot the existing service, Account No. 950-07362 will be assigned to."

The first alternative requires the applicant to make "extensive improvements and additions" to the existing county DWS water system in accordance with the DWS memorandum dated May 4, 2009 in the subdivision file.

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 3) states in part:

"The Applicant is requesting a variance to allow the proposed two-lot agricultural subdivision to utilize a water catchment system for domestic consumption, agricultural pursuits, and fire fighting purposes in lieu of providing water from the County water system, as required under Section 23-84(1) of the Subdivision Code. The Applicant's decision to utilize water catchment system for the proposed two-lot agricultural subdivision was due to the following reasons: 1) County water to support the two-lot agricultural subdivision is not available to the Property. The closest County waterline (6" diameter ductile iron) is approximately 2,500 feet from the makai boundary of the Property within Lorenzo Road, 2) Although the entire Property is within the service limits of the Department of Water Supply's ("DWS") water systems (sic), we were informed by DWS staff that the DWS implemented a Moratorium on development of new water systems in the South Point area, and area including the Property, until dilapidated 8" water line is replaced by the County. The DWS has not initiated the process to begin the replacement of the Waiohinu Homestead Tank to South Point Tank water line and the DWS has no plans to do so, in the foreseeable (sic).

County water is available to the Lamb residence located on the southeast corner of the Property, through DWS meter No. 37322009, which was created sometime in the early 80's. The Lamb residence water meter is not physically located on the Property. The Lamb residence water meter is located on the mauka corner of the nearby TMK: (3) 9-4-05:037, a 20.001 acre property located makai of the Property, abutting Mamalahoa Highway. The DWS maintains the water line adjoining the water mainline within Mamalahoa Highway to a series of water meters located within Parcel 037, including the Lamb residence water meter. A single transmission line located on the eastern boundaries of the properties located between the Property and the Lamb residence water meter deliver County water to the Lamb residence."

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In view of the above, there are no other reasonable alternatives in resolving the difficulty of the applicant or owners. Given the history of development upon the property and other unusual circumstances, the imposition of improving the existing public water system or providing an approved alternative private water system meeting DWS standards to permit proposed 2-lot subdivision (SUB 09-000864) would be putting excessive demands upon the applicant or 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 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 2-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 rainfall within the subject TMK property and surrounding area utilizing information and exhibits provided by the applicant indicate that the subject TMK property and abutting properties can rely on rainfall to support individual or separate private rainwater

catchment systems for potable and emergency uses within proposed subdivision. The map extract submitted by the applicant compared with rainfall information utilizing the Planning Department's GIS data base denotes that the subject TMK property or proposed subdivision is situated near or above the 60 inch isohyet line. The analysis of the applicant's submittals and exhibits show the proposed 2-lot subdivision will receive at least 60 inches or more of rainfall annually. The proposed subdivision meets Rule No. 22-Water Variance.

The applicant's variance application was acknowledged by letter dated May 7, 2009 and additional time to confirm posted signs and incorporate other submittals into Planning Department files. The applicant or applicant's representative granted the Planning Director an extension of time to render decision on the variance application to July 17, 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 2-lot subdivision of the subject TMK property without providing a water system for 1-proposed lot meeting DWS standards 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 the DWS memorandum dated May 21, 2009, the applicant shall contact the DWS to confirm existing service or Account No. 950-07362 will remain designated to the "Lamb" residence and confirm in writing which "lot number" created by proposed 2-lot subdivision will be designated or assigned the existing DWS service: further, that DWS Account No, 950-07362 or assigned water meter "shall not share the existing meter in any way" to other dwelling(s) or other accessory buildings upon lots created by proposed subdivision or abutting properties or users. This condition shall be met prior to issuance of final subdivision approval to subdivision application-SUB 09-000864.

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 09-000864. 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 09-000864. 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 09-000864 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
 - c. Any lots created by SUB 09-000864 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 and be located in area accessible to

fire apparatus. 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 09-000864 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 09-000864, the owner(s) of the lot(s) created by SUB 09-000864 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.

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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 Variance-VAR 09-009 null and void.

Sincerely,



BJ LEITHEAD TODD
Planning Director

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xc: Manager-DWS
SUB 09-000864