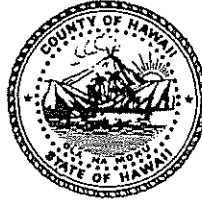


William P. Kenoi
Mayor



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

July 23, 2009

Chrystal Thomas Yamasaki, L.P.L.S.
WES THOMAS ASSOCIATES
75-5749 Kalawa Street
Kailua-Kona, HI 96740

Dear Ms. Thomas-Yamasaki:

SUBJECT: VARIANCE-VAR 09-014
Applicant: WES THOMAS ASSOCIATES
Owner: SAMA FARMS, INC.
Request: Variance from Chapter 23, Subdivisions,
Improvements Required
Tax Map Key: 7-5-001:031, (SUB 02-000077)

After reviewing your variance application, the Planning Director certifies approval of Variance-VAR 09-014 subject to variance conditions. The variance permits 3-lot subdivision (SUB 02-000077) of the above referenced TMK property without providing a water supply system to 2-proposed lots 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 for proposed subdivision be **approved** based on the following findings:

BACKGROUND

1. **Location.** The subject TMK property, containing approximately 3.961 acres, being portion of L.C. Aw. 11216, Ap. 39 to M. Kekauonohi is situated at Keopu 1st, North Kona, Hawaii.

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Note: The subject TMK property or Lot 4-B containing approximately 3.961 acres was created by SUB 6560 approved on March 22, 1995. In addition, it appears that the subject TMK property or SUB 6560 is subject to VAR 560 issued on January 11, 1994 and variance conditions dated January 11, 1994.

2. **Zoning.** The subject property is zoned Agricultural (A-1a) 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 02-000077) and preliminary plat map (PPM) proposing to subdivide subject TMK property into 3-lots. Further action on the subdivision application (SUB 02-000077) is being deferred pursuant according to letters in the subdivision file.
4. **Variance Application.** The applicant submitted the variance application and submittals on April 14, 2009. The application includes a transmittal letter dated March 27, 2009 which states in part:

"The owner/subdivider of the subject property wishes to divide it into three lots. One lot has an existing water commitment and as such, we are seeking a variance to allow the two additional lots, each in excess of one acre. The current zoning is A-1a (agriculture with one acre minimum lot size), therefore, the lot split is consistent with the zoning designation. The subject property is located at Keopu 1st, North Kona, Hawaii. The property is currently un-used, however there is a building permit for dwelling to be built on the makai portion of the property.

According to the Mean Annual Rainfall map (dated 1994) and the "rainfall" layer of the County GIS maps, the property receives in excess of 60 inches annually. A copy of the map is enclosed for your reference."

5. **Variance Application (VAR 09-014)-Agency Comments and Requirements:**
 - a. The State of Hawaii Department of Health (DOH) memorandum is dated May 12, 2009. Refer to SOH-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.

Please be informed that the applicant has indicated that the existing service to the subject parcel (Account No. 880-26310) will be designated to proposed Lot 4-B-1 in the subject subdivision.

Further, we have no objection to the applicant’s proposed use of private rainwater catchment systems for the remaining two (2) lots within the subdivision and no objection to final subdivision approval being granted. However, the applicant will be informed through a copy of this letter that the existing service shall not be shared with either of the two (2) lots to be provided with rainwater catchment systems.”

6. **Notice to Surrounding Owners.** The applicant’s submitted transmittal letter dated May 13, 2009 indicating notice was mailed to surrounding property owner(s) within 300 feet of subject TMK property and list with affixed USPO mailing receipt(s) dated May 13, 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 June 29, 2009 regarding sign posted or “placed on” subject TMK property and attached photograph/picture of the posted sign.

7. **Comments from Surrounding Property Owners or Public.** No other agency comments were received and no objections were received. The following objection letter from was received:

- 7a. Objection letter (fax) dated May 28, 2009 from Barbara Ells and Ben Dysart citing water, cultural, and concern regarding additional traffic.

Chrystal Thomas Yamasaki, L.P.L.S.
WES THOMAS ASSOCIATES
Page 4
July 23, 2009

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 recent DWS memorandum dated March 16, 2009 in subdivision file (SUB 02-000077) states in part the following:

"We have reviewed the final plat map for the proposed subdivision. Pleas (sic) refer to our October 20, 2005, memorandum to you for our comments and requirements."

The DWS memorandum dated October 20, 2005 in subdivision file (SUB 02-000077) states in part the following:

"Therefore, only one (1) unit of water is available; and water is not available or the proposed 3-lot subdivision. Extensive improvements including, but not limited to, source, booster pumps, and transmission lines may be required. Currently, funding is not available from the Department for such improvements and no time schedule is set."

The first alternative requires the applicant to make "extensive improvements, including but not limited to, source, booster pumps, and transmission lines" to the County DWS water system currently providing service to subject TMK property.

The second alternative would be to design, drill and develop private wells and install the necessary water system improvements in accordance with DWS standards for 2-proposed additional lots.

In view of the above, there are no other reasonable alternatives in resolving the difficulty of the applicant. The imposition of improving the existing public water system or providing an approved alternative private water system meeting DWS standards for proposed 3-lot subdivision (SUB 02-000077) would be putting excessive demands upon the applicant to improved the current DWS water system 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 "Variance from the Subdivision Water Requirements" to allow and utilize privately owned individual rain water catchment systems for 2-lots created by proposed 3-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 the rainfall map and information provided by the applicant indicate that the subject TMK property and surrounding areas receive 60 inches of rainfall annually to support individual or separate private rainwater catchment systems for potable and emergency uses for the proposed subdivision. The map extract submitted by the applicant compared with the isohyet map study compared with Planning Department's GIS data denotes subject TMK or proposed subdivision is situated near and above the 60 inch isohyet line. The analysis of the applicant's submittals indicates the proposed subdivision or 2-proposed lots utilizing private rainwater catchment will receive at least 60+ inches of rainfall annually. The proposed subdivision meets Rule No. 22-Water Variance.

The variance application submitted by the applicant was acknowledged by letter dated May 7, 2009 and additional time to submit sign affidavit and other required submittals was necessary. The applicant granted the Planning Director additional time to incorporate submittals and render decision on the applicant's variance application to 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 permit proposed 3-lot subdivision of the subject TMK property without providing a water system meeting DWS standards for 2-proposed lots 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. The applicant or subdivider shall confer with the DWS and designate in writing that proposed Lot 4-B-1 will be assigned or provided with a DWS water service (Account No. 880-26310) prior to submittal of the required written agreement and issuance of final subdivision approval to SUB 02-000077. Pursuant to the DWS memorandum dated May 21, 2009, the existing DWS service or account assigned to proposed Lot 4-B-1 shall not be shared "with either of the two (2) lots to be provided with rainwater catchment systems".
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 02-000077. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting 2-proposed lots without a DWS service created by 3-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 02-000077. 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 02-000077 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
- c. Any lots created by SUB 02-000077 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 in an area accessible by fire apparatus with approved fire connection. 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 02-000077 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 02-000077, the owner(s) of the lot(s) created by SUB 02-000077 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.
 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.

Chrystal Thomas Yamasaki, L.P.L.S.
WES THOMAS ASSOCIATES
Page 9
July 23, 2009

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

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xc: Manager-DWS
SUB 02-000077
Barbara Ells and Ben Dysart