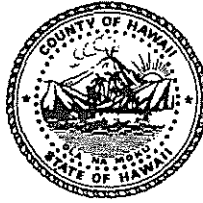


William P. Kenoi  
Mayor



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 12, 2010

All Aina Services  
PO Box 291  
Laupahoehoe, Hawai'i 96764

Dear: Ms. Mikkelson:

**SUBJECT: VARIANCE APPLICATION - VAR-09-035**  
**Applicant: ALL AINA SERVICES**  
**Owners: TOM AND VICKI NELSON**  
**Request: Variance from Chapter 23, Subdivisions,**  
**Improvements Required**  
**TMK: 1-6-004:037, (SUB 08-000761)**

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After reviewing your variance application, the Planning Director certifies the approval of Variance-VAR 09-035 subject to variance conditions. The variance permits proposed 6-lot subdivision (SUB 08-000761) 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 a variance application from the minimum water system requirements for proposed subdivision be **approved** based on the following findings:

#### **BACKGROUND**

1. **Location.** The subject property (TMK: 1-6-004:037 Lot 1305-C), consists of twenty acres of land area and is situated at Kea'au, Puna, Hawaii, Map 96, Land Court Application 1053.

**APR 15 2010**

2. **Zoning:** The subject property is zoned Agricultural – 1 Acre (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 08-000761) and preliminary plat map (PPM) dated June 1, 2009 proposing to subdivide subject TMK property into 6 lots. Further action on the subdivision application was deferred on August 11, 2009.
4. **Variance Application.** The applicant submitted variance application and submittals on April 21, 2009 including a survey map dated March 12, 2009 proposing to subdivide subject TMK property into 6 lots. The variance application includes background information and states in part (page 1) the following:

“According to the Department of Water Supply, the subject property is not within service limits of the Department’s existing water system facilities. The nearest water system facility is a 12-inch waterline along the Keaau-Pahoa Road, approximately 1.5 miles from the property. In order to live on this property and most of the lots in Ainaloa Estates Subdivision, water catchment systems are necessary. Therefore, there are special and unusual circumstances applying to the subject property which exist either to a degree which deprives the applicant of substantial 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.”

5. **Variance Application (VAR 09-035)-Agency Comments and Requirements:**

- a. The State Department of Health (DOH) memorandum is dated November 9, 2009. Refer to DOH memorandum in variance file.
- b. The County of Hawaii-Hawaii Fire Department (HFD) memorandum is dated November 30, 2009. Refer to HFD memorandum in variance file.
- c. The Department of Water Supply (DWS) memorandum, dated November 24, 2009, states in part:

“We have reviewed the subject application and our comments from our July 30, 2009 memorandum to your office, regarding the subject subdivision, still stand.

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

6. **Notice to Surrounding Property Owners.** The applicant's agent filed a transmittal letter dated November 10, 2009, and attached copy of notice sent to surrounding property owner(s) within 300 feet of the subject property, and mailing receipts dated November 10, 2009. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on November 9, 2009.
7. **Posted Sign.** The applicant submitted an affidavit dated August 5, 2009 regarding sign posted on the subject property and a photograph of the posted sign.
8. **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, 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 July 30, 2009 in subdivision file (SUB 08-000761) regarding the PPM proposing to subdivide subject TMK property into 6 lots states, in part, the following:

"Please be informed that the subject property is not within the service limits of the Department's existing water system facilities.

The nearest Department of Water Supply water system facility is at the end of an existing 12-inch, waterline along Keaau-Pahoa, and approximately 1.5 miles from the property."

Subsequent to receipt of above DWS memorandum, the Planning Department sent the applicant's surveyor a letter on August 11, 2009 citing the DWS requirements for proposed 6-lot subdivision and copy of Rule 22. The Planning Department's letter (page 1 and page 2) states in part:

"For your information and use, enclosed is a copy of Rule 22, Water Variance of the Planning Department's Rule of Practice and Procedure."

In consideration of above, first alternative requires the applicant or subdivider to extend or make "extensive improvements and additions" to nearest County DWS water system situated approximately 1.5 miles from the subject TMK property in accordance with the DWS memorandum in the subdivision file or apply for a variance from the minimum water system requirements of the Subdivision Code as provided by Rule No. 22, Water Variance.

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

In view of the above, there are no other reasonable alternatives in resolving the difficulty of the applicant or subdivider. The imposition of improving the nearest public water system or providing an approved alternative private water system meeting DWS standards to permit proposed 6-lot subdivision (SUB 08-000761) would be putting excessive demands upon the applicant or subdivider when a more reasonable alternative is available (e.g. applying for a variance pursuant to Rule 22, Water Variance to permit proposed 6-lot subdivision of subject TMK property.

#### **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 applicant's agent filed a variance application requesting "Variance from Section 23-84. Water Supply" to allow and utilize privately owned individual rain water catchment systems for proposed 6-lot subdivision 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 a variance application requesting variance from Section 23-84 of Chapter 23, the County Subdivision Code. Rule 22 limits subdivisions requesting a variance to six (6) lots and, requires that the proposed 6-lot subdivision seeking the variance to allow for 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 rainfall information provided by the applicant compared with rainfall maps and data maintained in the Planning Department indicates the subject TMK property receives approximately 160 inches of rainfall annually to support private rainwater catchment systems for potable and emergency uses for the proposed 6-lot subdivision. According to map- Plate 6-WATER-RESOURCES INVESTIGATIONS REPORT 95-4212, the proposed subdivision appears to be nearest a 160-inch isohyets line; and, pursuant to other rainfall information available at the State Climate Office (HSCO), the proposed subdivision is situated within in an area which receives between 120 inches and 160 inches of rainfall annually. The analysis of the applicant’s submittals, together with rainfall maps and other published rainfall data for the general area, indicate the subject property or proposed subdivision will receive in excess of 60 inches of rainfall annually. The proposed subdivision meets Rule No. 22-Water Variance.

The applicant or agent’s variance application was acknowledged by letter dated November 3, 2009 and additional time was required to submit and incorporate revised sign affidavit and other submittals into the variance application’s file. The applicant’s agent granted the Planning Director an extension of time to render decision on the agent’s 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 request to allow proposed 6-lot subdivision of the subject TMK property without providing a water system for 6-proposed lots 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. 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 08-000761. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting 6-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 08-000761). 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 08-000761 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
  - c. Any lots created by SUB 08-000761 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 6,000-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 an 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 Water System is upgraded or an improvement district initiated to enable service to the lots created by SUB 08-000761, the owner(s) of the lot(s) created by SUB 08-000761 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. 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.

All Aina Services

Page 8

April 9, 2010

Should any of the foregoing stated conditions not be complied with, the Planning Director may proceed to declare Variance-VAR 09-035 null and void.

Sincerely,



BJ LEITHEAD TODD  
Planning Director

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xc: Manager-DWS  
SUB 08-000761