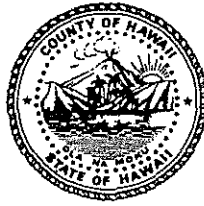


William P. Kenoi
Mayor



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

October 7, 2010

M&E Pacific, Inc.
100 Pauahi Street, Suite 207
Hilo, HI 96720

Gentlemen:

SUBJECT: **VARIANCE:** VAR 10-007
Representative: M&E PACIFIC, INC.
Applicants: PHILLIP BUGADO, ET AL.
Owners: PHILLIP BUGADO, ET AL.
Request: Variance from Chapter 23, Subdivisions,
Article 6, Division 2, Improvements Required,
Section 23-84, Water Supply, (1)(2)
Tax Map Key: 4-1-004:004 and 039, (SUB 09-000870)

After reviewing your variance application, the Planning Director certifies the approval of Variance-VAR 10-007 subject to variance conditions. VAR 10-007 permits proposed 4-lot subdivision (SUB 09-000870) to be created without providing a water system meeting the minimum requirements of the Department of Water Supply (DWS). The variance is from Hawai'i County Code, Chapter 23, Subdivisions, Division 2, Improvements Required, Section 23-84, Water Supply, (1)(2).

The Planning Director concluded that variance from the minimum subdivision water system requirements for the proposed 4-lot subdivision can be **approved** pursuant to Rule 22, Water Variance and following findings:

BACKGROUND

1. **Location.** The referenced TMK property containing approximately 48.21 acres, being portion of Grant 4518 to Antone Simas Jr., is situated at Niupea Homesteads, Niupea, Hāmākua, Hawai'i.

OCT 11 2010

M&E Pacific, Inc.

Page 2

October 7, 2010

2. **Zoning.** The subject property is zoned Agricultural (A-5a) by the County and designated Agriculture "A" by the State Land Use Commission (LUC). The property is not within the Special Management Area (SMA).
3. **Subdivision Request/PPM.** The applicant's representative submitted a subdivision application (SUB 09-000870) and revised preliminary plat map (PPM) dated November 13, 2009, proposing four (4) lots. Further action on the subdivision application is being deferred pursuant to letter dated November 25, 2009, in the subdivision application file (SUB 09-000870).
4. **Variance Application.** The applicant submitted the variance application, including a rainfall map, on March 4, 2010. The owners are requesting "Variance from the minimum water requirements." The application includes an attachment and rainfall map showing the approximate location of proposed subdivision. The attachment states, in part:

"There is no water system in the area per Department of Water Supply letter dated December 4, 2009." The rainfall map denotes that the proposed subdivision is located within a region that receives at least 60 inches or more of rainfall annually.
5. **Variance Application (VAR 10-007)-Agency Comments and Requirements:**
 - a. The State of Hawai'i-Department of Health (SOH-DOH) memorandum is dated May 17, 2010. Refer to SOH-DOH memorandum in the variance application file.
 - b. The County of Hawai'i-Hawai'i Fire Department (COH-HFD) memorandum is dated May 24, 2010. Refer to COH-HFD memorandum in the variance application file.
 - c. The Department of Water Supply (DWS) memorandum, dated June 2, 2010, states, in part:

"We have reviewed the subject application and our comments from our February 12, 2010, memorandum to your office, regarding the subject subdivision still stand."
6. **Notice to Surrounding Owners.** The applicant's representative submitted a letter, including copy of notice sent to surrounding property owner(s) within 300 feet of subject TMK property, and USPS mailing receipts dated May 18, 2010. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on May

17, 2010.

Posted Sign. The applicant's representative submitted affidavit dated June 8, 2010, regarding sign posted upon subject TMK property and photograph of posted signs upon subject TMK property.

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, rainfall information, and agency comments, the Planning Director has determined that there are special or unusual circumstances applying to subject TMK property that 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 December 4, 2009, regarding "revised preliminary map" in subdivision file (SUB 09-000870) states, in part, the following:

"We have reviewed the revised preliminary plat map.

We reiterate that pursuant to Section 23-7 of the Hawai'i County Code, we have no objections to the proposed consolidation/resubdivision action created for repartitioning purposes as no additional lots are being created. (sic)

Please be informed that there is no water system in the area."

The first alternative requires the applicant to provide a "water system" or county DWS water system for proposed 4-lot subdivision meeting with the requirements of Chapter 23, Subdivisions.

The second alternative would be to design, drill and develop private wells or construct an alternative or privately-owned water system in accordance with DWS standards for proposed 4-lot subdivision.

In view of the above, there are no other reasonable alternatives in resolving the difficulty of the applicant. The imposition or cost of constructing a DWS water system or providing an approved

M&E Pacific, Inc.

Page 4

October 7, 2010

alternative private water system meeting DWS standards for the proposed 4-lot subdivision (SUB 09-000870) would be putting excessive demands upon the applicant when an alternative to utilize private rainwater catchment systems for proposed the agriculturally-zoned subdivision is allowed pursuant to Rule 22, Water Variance.

INTENT AND PURPOSE-WATER VARIANCE

The intent and purpose of requiring a water system for and within the proposed subdivision is to assure that potable 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 request for “variance from minimum water requirements” to allow and utilize privately-owned individual rain water catchment systems for proposed 4-lot agricultural zoned subdivision, can meet the intent and purpose of the Subdivision Code, and can be 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 a variance request from the minimum water requirement pursuant to Chapter 23, Subdivisions. Section 23-84 of Chapter 23 or 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 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 for the region and/or within subject TMK property utilizing rainfall maps at the Planning Department compared with rainfall information provided by the applicant indicates the subject TMK property or proposed subdivision receives in excess of 60 inches of rainfall annually to support individual or separate private rainwater catchment systems for potable and emergency uses. The proposed 4-lot subdivision meets Rule No. 22-

M&E Pacific, Inc.

Page 5

October 7, 2010

Water Variance.

Based on the foregoing findings, a variance request from water supply pursuant to Rule 22, Water Variance 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 permit proposed 4-lot subdivision of the subject TMK property pursuant to Rule 22, Water Variance and/or without providing a water system meeting DWS standards for proposed 4-lot subdivision application (SUB 09-000870) 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(s), 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 conditions and prior to receipt of final subdivision approval of SUB 09-000870. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting 4-lot subdivision application and shall be duly recorded at the Bureau of Conveyances of the State of Hawai'i by the Planning Department at the cost and expense of the owners:
 - a. The applicants or subdividers agree and accept the fact that a County dedicable public water system is not now able to service the proposed subdivision SUB 09-000870. 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 09-000870 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
 - c. Any lots created by SUB 09-000870 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 Hawai'i County Fire Department and be located in an area accessible to fire apparatus. The Hawai'i 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 09-000870 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 09-000870, the owner(s) of the lot(s) created by SUB 09-000870 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

M&E Pacific, Inc.

Page 7

October 7, 2010

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.
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 Variance-VAR 10-007 null and void.

Sincerely,



BJ LEITHEAD TODD
Planning Director

WRY:kwr

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xc: Manager-DWS
SUB 09-000870