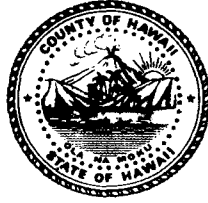


William P. Kenoi
Mayor



BJ Leithead Todd
Director

Margaret K. Masunaga
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County of Hawai'i

PLANNING DEPARTMENT

Aupuni Center • 101 Pauahi Street, Suite 3 • Hilo, Hawai'i 96720
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December 2, 2010

Ms. Catherine Dumond
RR 2, Box 4079
Pahoa, HI 96778

Dear Ms. Dumond:

SUBJECT: Variance Application: VARIANCE (VAR 10-022)
Applicant: Catherine Dumond
Owner: Catherine Dumond
Request: Variance from Chapter 23, Subdivisions
TMK: 1-4-070:046 (SUB 08-000750)

After reviewing your Variance Application, the Planning Director certifies the **approval** of **VAR 10-022** from minimum **water supply and road improvements**, subject to variance conditions. The variance is from Hawai'i County Code, Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-84, Water Supply, (1)(2), Section 23-86, Requirements for dedicable streets, Section 23-93, Street lights, Section 23-94, Street name and traffic signs, and Section 23-95, Right-of-way improvement.

VAR 10-022 permits a proposed two-lot subdivision (SUB 08-000750) of the subject TMK property (TMK 1-4-070:046), which is a consolidated lot ("LOT 160-A") consisting of four original non-conforming sized lots (Lot 160, 161, 162, and 163) that was consolidated by previous owner on February 2, 1987. The original Vacationland Subdivision (Vacationland Hawaii Subdivision) was permitted in 1962 by the County creating 214 lots prior to adoption of the Zoning Code and Subdivision Code in 1967. The variance permits re-subdivision of LOT 160-A creating an additional lot without the applicant having to provide 1) a water system meeting the minimum requirements of the Department of Water Supply (DWS) to the designated additional lot and 2) expanding and/or constructing dedicable road improvements upon privately owned rights-of-way between Kaimu-Kapoho Road and to/along the property as required by the Department of Public Works (DPW).

Hawai'i County is an Equal Opportunity Provider and Employer

The decision to approve VAR 10-022 to permit the proposed subdivision is based on the following background information and findings.

BACKGROUND

1. **Location.** The above referenced TMK property, containing approximately 0.73 acres, is located within the Vacationland Hawaii Subdivision located in Kapoho, Puna, Hawaii. The TMK property's address is 14-5020 Hoolai Road.
2. **Zoning.** The property was zoned Single Family Residential (RS-10) by the County in 1967 and the property is designated Urban "U" by the State Land Use Commission (LUC). The property is located within the Special Management Area (SMA). According to the acknowledgment letter dated April 25, 2008 in the subdivision application file, the Planning Director determined that the proposed two-lot subdivision of "LOT 160-A" is exempt from the definition of "development" with regards to the SMA and, further, the property does not abut the shoreline.
3. **Subdivision Application.** The subdivision application (SUB 08-000750) and preliminary plat map (PPM), dated February 29, 2008, was filed by the Independent Hawaii Surveyors, LLC for "SUBDIVIDER: ENTERPRIZZ, LLC". The two-lot subdivision application was acknowledged by the Planning Department via letter dated April 25, 2008. Subsequently, the property was acquired by Catherine Dumond (current owner/subdivider/applicant), who is continuing to pursue the subdivision.

Note: The subject property ("LOT 160-A") containing 32,539 square feet, consists of four original lots, or Lot(s) 160, 161, 162, and 163 of "Vacationland Hawaii" Subdivision, approved by the County of Hawaii circa 1962. The Planning Department allowed a previous owner(s) to consolidate four lots (denoted on File Plan 814) into "LOT 160-A" on February 2, 1987 (CON 603). County Real Property Tax Office records disclose building permits to construct a dwelling and other structures upon the original "non-conforming" sized lots before the Planning Department approved the consolidation. The locations of the structures are not denoted on the approved consolidation map dated January 11, 1987 in the consolidation file.

The PPM denotes the position of a two-story dwelling, attached deck and other structures on the lot. Page 1 of the April 25, 2008 letter, acknowledging the proposed two-lot subdivision application, states in part "We note that there are property line encroachment, and possibly some building permit issues on the lots. Please advise this department of the subdivider's intentions for remedying those items (permit, permit not required, move, remove, variance application, etc.)."

4. **Variance Application.** The variance application to permit a two-lot subdivision, without providing the typically-required road and water requirements, was acknowledged by Planning Department letter dated July 28, 2010. The variance application includes a copy of PPM dated February 29, 2008, photographs of current access, and other information. The Planning Department required additional time to verify current water service issued to the subject property by the County DWS after the property was consolidated in 1987, the availability of water via the Kapoho Kai Water Association, and the status of the current non-dedicable roadways originally permitted in 1962 within the Vacationland Hawaii Subdivision.

Note: VAR 10-022 is for consideration of variance from subdivision requirements only. The position of structures and improvements upon the property, which appear to encroach into required setbacks and may not have been constructed with county permits, shall be addressed by the subdivider prior to the county's granting of final subdivision approval to SUB 08-000750.

Real Property Tax Office permit records indicate or purport only three permits issued for improvements constructed upon an original TMK property (TMK 1-4-070:048) or "Lot 161" prior to the Planning Department granting approval for CON 603 creating LOT 160-A. According to County Tax Records, the following permits were issued to be built upon "Lot 161":

| <u>Date</u> | <u>Permit No.</u> | <u>Amount</u> | |
|-------------|-------------------|---------------|----------------------|
| 03/13/1983 | 62011 | \$25,000 | House/Water Tank (?) |
| 06/01/1980 | 802510 | \$900 | Carport |
| 01/13/1975 | 830065 | \$1,600 | Trellis |

Approval of the current application from minimum water and road requirements does not imply tacit approval of variances from Chapter 25, Zoning relative to minimum yards, buildings or uses. (Please refer to earlier acknowledgement letter dated April 25, 2008 in the SUB file and VAR conditions cited below).

5. **Agency Comments and Requirements:**

- a. The State of Hawai'i Department of Health (DOH) memorandum is dated July 30, 2010. Refer to SOH-DOH memo in VAR application file.
- b. The Hawai'i Fire Department (COH-HFD) memorandum is dated August 2, 2010. Refer to COH-HFD memo in VAR application file.
- c. The Department of Public Works (DPW) memorandum is dated August 16, 2010. Refer to DPW memo in VAR application file.

Note: The width of the current rights-of-way, status of paved non-dedicable roadways, and road maintenance upon these rights-of-way within the Vacationland Hawaii Subdivision have been privately addressed and paid for by the users since 1962. The status of ownership of the privately owned/maintained access between Highway 137 and the original 214 lots, including Hoolai Road fronting the subject property, has not significantly changed during the last 38 years.

In retrospect, had the original owner in 1987 proposed to consolidate or reconfigure the original four non-conforming lots into two lots at that time no additional road improvements would have been imposed by DPW at current time. The amended reconfiguration of four smaller non-conforming lots into two larger lots would be permitted pursuant to Chapter 23, Subdivisions, Section 23-7, Applicability to consolidation or re-subdivision action. A consolidation from four lots to two lots in 1987 would have been approved in 1987 since it would have resulted in the creation of fewer lots than previously existed and resulted in a lesser traffic impact.

- d. The Department of Water Supply (DWS) memorandum dated August 31, 2010 states in part the following:

- “1. Please be informed that the subject parcel is served by an existing 5/8-inch meter located at the end of our Department’s existing 6-inch waterline with Kapoho Kai Road, approximately 750 feet from the subject parcel. The applicant shall designate, in writing, which lot within the proposed 2-lot subdivision will be assigned the one (1) existing service (Account No. 070-15833) to the subject parcel. The Department will further clarify that the existing service to the subject parcel is limited to an average daily usage of 400 gallons, suitable for only one (1) single-family dwelling, and can be designed to one (1) of the proposed lots in the subdivision.
2. As additional water cannot be made available for the proposed subdivision, we have no objection to the use of a private rainwater catchment system to service the other lot within the subdivision. The applicant will be informed through a copy of this letter that the existing meter to the subject parcel shall not be shared with the other lot within the subdivision.”

Note: The variance application file includes a copy of an earlier letter received by the Planning Department from the Kapoho Water Association or “KWA”, dated July 31, 2001, regarding the proposed subdivision

application. It appears that this letter was received by the Planning Department on or about August 5, 2008. The copy of the letter from "KWA" states in part the following:

"In regards to the above subdivision SUB-08-000750 the Kapoho Water Association does have water service available for this lot.

Please note that any and all new water service connections will have to meet our association's requirements and standards for water service."

Subsequent to review of the above, the Planning Department received a letter from the Kapoho Kai Water Association, dated August 17, 2010, regarding the SUB and VAR, which states in part the following:

"We also wish to clarify that no application has been made and no approval has been given for any meters for the subject lot, as it exists or as subdivided. Currently the house on the lot has a "spaghetti line" connecting directly to the county water on the main road. The house has no account with the KKWA.

If the property owners were to apply for water meters from our organization, the KKWA, they would only be considered if they fulfilled current state and county septic system requirements as stated in our by-laws and regulations."

6. **Notice to Surrounding Property Owners.** The applicant filed copy of the notice sent to surrounding property owners within 300 feet of the subject property, including mailing receipt. According to the USPS receipt, notice was mailed to surrounding property on August 2, 2010. Notice of this application was published in the Hawai'i Tribune Herald and West Hawai'i Today on August 5, 2010. Furthermore, the applicant filed an affidavit, dated November 22, 2010, regarding posting a sign posted upon subject TMK property including pictures "of in-place signage" and other information regarding status of the posted sign.
7. **Comments from Surrounding Property Owners or Public.**
 - a. Letter and comments from Joshua Bloomgarden, President, KKWA, regarding water availability to the proposed subdivision and other concerns regarding septic system requirements, etc.
 - b. Letter (fax) from Larry and Betty Obermann, dated August 25, 2010, supporting the applicant's request for variance was received.
 - c. Letter (undated) from Enterprizz LLC was received on or about August 24,

2010 supporting the current subdivider or applicant's request for variance from "the road and water improvements for the subject property".

- d. Letter from Murray Lapides was received August 24, 2010 opposing "the current application". In sum, this opposition letter raises issue with the applicant's statement of receiving approval for two water meters from the association while this individual was informed that no additional meters were available until the county approves additional water. The letter also cites damage to the environment by allowing additional development.

REVIEW CRITERIA

Chapter 23, Subdivisions, specifically, Section 23-14, provides the Planning Director general authority to grant variances from Chapter 23. Section 23-14 states in part:

"Variances from the provisions of this chapter may be granted; provided, that a variance shall not allow the introduction of a use not otherwise permitted within the district; and provided further that a variance shall not primarily effectuate relief from applicable density limitations.

Further, Section 23-15, Grounds for variances, states that no variance will be granted unless it is found that:

- a) There are special or unusual circumstances applying to the subject real property which exist either to a degree which deprives the owner or 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 that property; and
- b) There are no other reasonable alternatives that would resolve the difficulty; and
- c) The variance will be consistent with the general purpose of the district, the intent and purpose of this chapter, and the County general plan and will not be materially detrimental to the public welfare or cause substantial, adverse impact to an area's character or to adjoining properties.

Water Supply Requirements for SUB 08-000750

In considering Criteria "a" above, the Planning Director notes that LOT 160-A was approved by a consolidation of four original nonconforming lots (created by the Vacationland Hawaii Subdivision circa 1962) into one large lot (CON 603) on February 2, 1987 containing an aggregate area of 32,539 square feet. County building records indicate that a dwelling and other structures were permitted to be constructed before the consolidation. Prior to 1987 and/or approval of CON 603 the original lots relied on individual rainwater catchment systems for potable and emergency needs. In sum, between 1987 and 2001 the availability of County water to the subject property and any other building lots created by the Vacationland Hawaii

Subdivision was severely limited until a 6-inch water line and master meter were installed by the Kapoho Kai Water Association.

Subsequent to 1987, DWS records indicate the subject property was issued a County water meter located near the intersection of Kapoho Kai Drive and Highway 137. The DWS memorandum (located in the SUB 08-000750 file), dated May 7, 2008, states in part:

“Please be informed that the subject property is serviced through a master meter and distributed by a water system, which does not meet the Department’s water system standards. Further, water is not available for the proposed subdivision.”

In considering Criteria “b” above, DWS cannot provide additional water (second DWS water meter) for the proposed subdivision or additional lot requested. Water availability is further clarified by the Kapoho Kai Water Association (KKWA) letter, dated August 17, 2010, stating:

“We also wish to clarify that no application has been made and no approval has been given for any meters for the subject lot, as it exists or as subdivided. Currently the house on the lot has a “spaghetti line” connecting directly to the county water on the main road. The house has no account with the KKWA.

If the property owners were to apply for water meters from our organization, the KKWA, they would only be considered if they fulfilled current state and county septic system requirements as stated in our by-laws and regulations.”

Therefore, in lieu of providing an independent rainwater catchment system for the proposed additional lot not serviced by the County water system, the applicant requests a variance to permit alternative water service(s) from a privately owned water system (Kapoho Kai Water Association) or master meter located with Kapoho Kai Drive near the Vacationland Hawaii Subdivision.

In considering Criteria “c” above, the DWS memo, dated August 31, 2010, states in part “As additional water cannot be made available for the proposed subdivision, we have no objection to the use of private rainwater catchment system to serve the other lot within the subdivision. The applicant will be informed through a copy of this letter that the existing meter to the subject parcel shall not be shared with the other lot within the subdivision.”

Therefore, the cost to construct additional water supply improvements in accordance with the DWS standards or an alternative private water system meeting DWS standards, required by Section 23-84, Water Supply, would be putting excessive demands upon the subdivider when a more reasonable alternative (i.e. allowing the current applicant or owner to apply for and obtain a water service from the Kapoho Kai Water Association for the additional lot) should be considered and allowed by variance subject to variance conditions.

Road Requirements for SUB 08-000750

Again, in considering Criteria "a" above, the Planning Director notes the subject property was created on February 2, 1987 (via CON 603). Prior to a previous owner submitting a request to consolidate the original four lots, County building records indicate that a dwelling and other structures were permitted to be constructed. During that time uses and structures were permitted along the private road network, which is not fully constructed to dedicable roadway standards. The status of ownership of the privately owned/maintained access between Highway 137 and the original 214 lots and land pattern created by Vacationland Hawaii Subdivision (including Hoolai Road fronting the subject property) has not significantly changed during the last 38 years.

In considering Criteria "b" above, had the original owner in 1987 proposed to consolidate the original four lots into two, the DPW requirements for further road improvements would not have been triggered. The reconfiguration into two larger lots would be permitted pursuant to Chapter 23, Subdivisions, Section 23-7, Applicability to consolidation or re-subdivision action; creating fewer lots than previously existed and resulted in a lesser traffic impact.

In considering Criteria "c" above, the department cites the DPW memo, dated August 16, 2010, which states in part the following:

"We believe the minimum road improvement requirements codified within Chapter 23 of the Hawaii County Code provide public welfare and safety and are a recommendation made by the Department of Public Works on all similar types of subdivision application.

We do not believe there are special or unusual circumstances with regard to the minimum requirements of Sections 23-86 and deviation from our standard recommendation may be considered arbitrary and capricious.

However, should the Planning Director determine that Section 23-15 is applicable, we defer to the director's authority."

The department has given consideration of the fact that the current two-story dwelling and other improvements constructed upon subject, including density permitted by Zoning (RS-10), before the property was permitted to be consolidated in 1987. Additionally, similar road improvements are also present elsewhere throughout the existing neighborhood.

In order to subdivide the property, an applicant is required to provide road improvements meeting the minimum requirements of the Department of Public Works. In review of the road variance request, the cost for additional right-of-way and road improvements would be putting excessive demands upon the applicant when a more reasonable alternative (i.e. allowing the existing road improvement to continue with ongoing maintenance provided by the private owners association) may be permitted under the general authority of the Subdivision.

INTENT AND PURPOSE

Chapter 23, Subdivisions, specifically, Section 23-14, permits and provides the Planning Director general authority to grant variances from Chapter 23.

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.

An alternative for certain properties from meeting the minimum requirements of the DWS is to allow privately-owned individual rain water catchment systems for up to six-lot subdivisions, pursuant to Planning Department Rule 22 – Water Variance. Rule 22 identifies, in part, that the variance "...applies to requests for subdivisions that propose to rely on rain catchment for their water supply, on *agriculturally-zoned* property...." (emphasis added). Given that the property is zoned RS-10, the proposed subdivision does not qualify or eligible for a variance pursuant to Rule 22.

Nevertheless, the Vacationland Hawaii Subdivision originally created 214 lots in 1962 and was zoned RS-10 circa 1967. During said time the owners of the original lots had to rely on independent privately owned rainwater catchment systems before County water was available. Potable water has subsequently been made available within this vicinity (including the Vacationland Hawaii Subdivision) by the completion of a main water line by the Kapoho Kai Water Association approximately ten years ago.

Given the circumstances regarding the status of the County's DWS meter issued to subject property and the availability of additional water via the Kapoho Kai Water Association to the proposed subdivision, a 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, it is felt that this variance will not be materially detrimental to the public's welfare and will not cause substantial adverse impact to the area's character and to adjoining properties.

Roadway Variance. The intent and purpose of road/access requirements to a proposed subdivision is to ensure legal and physical access to the proposed lots that are clearly defined and accessible from a public road by domestic and farm vehicles, police, fire, and other service vehicles under various weather conditions without constant maintenance.

Chapter 23 of the Subdivision Code presents numerous requirements for new subdivisions (including but not limited to minimum pavement widths, right-of-way widths, street signs and street lighting) in order to meet the minimum requirements of the Department of Public Works.

Given the property's size and nature of the consolidation approved in 1987, the existing subdivision approved nearly 38 years ago, the establishing the surrounding land patterns, and the presence of the existing private road network in this vicinity (which is presently paved, the improvements in good repair, and ongoing maintenance being the responsibility of the association and property owners) the variance request is found to be reasonable.

Had the previous owner elected to consider a consolidation of the original four lots into two lots in 1987, the current variance from water supply and roadways would be moot. After considering the property's background information and findings by the Planning Department, the Planning Director has determined that there are special and unusual circumstances regarding this specific property. The requested variance has contemplated alternatives for meeting water and road requirements and has found that other alternatives are not reasonable in order to remedy the difficulty. Furthermore, it is felt that the variances sought to permit the subdivision will not be materially detrimental to the public's welfare and will not cause substantial adverse impact to the area's character and to adjoining properties in this subdivision or immediate area.

VARIANCE DECISION – CONDITIONS

VAR 10-022, concerning the applicant's request to allow the proposed two-lot subdivision of the subject property without 1) providing a water system meeting Department of Water Supply standards for the proposed or additional lot having no service from the County DWS service (water meter) and 2) constructing dedicable road improvements required by the County DPW **is hereby approved subject to following variance conditions:**

General 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 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. No further subdivision of any lots created by SUB 08-000750 are permitted unless county water system requirements pursuant to Chapter 23, Subdivisions, are met.

4. No condominium property regime (CPR) shall be permitted on any lots created by SUB 08-000750.
5. No permit to allow an ohana dwelling or building permit issued to allow construction of an "ohana" dwelling shall be granted to the subject TMK property or upon lots created by proposed subdivision, subject to provisions of the Zoning Code or State Law, which may change from time to time.
6. The subdivision application's (SUB 08-000750) final plat map shall meet with all the conditions of this variance and/or the Hawai'i County Zoning Code and Subdivision Code not covered by this variance. No other variances from Chapter 23, Subdivisions, shall be granted to permit subdivision application SUB 08-000750.
7. The April 25, 2008 (paragraph 3) acknowledgement letter for SUB 08-000750 cites the presence of "property line encroachment, and possibly some building permit issues on the lots". The subdivider or current owner shall contact the Planning and Building Departments to address and discuss building encroachments, uses and what appears to be unpermitted structures, as denoted on the PPM dated February 29, 2008. Resolution of these issues, which may include securing permits and relocating/removing structures, shall be done prior to final subdivision approval.
8. 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.

Water Variance Conditions

1. Pursuant to Department of Water Supply (DWS) memorandum dated August 31, 2010, the applicant or subdivider shall contact the DWS and designate in writing which proposed building lot will be assigned the DWS water service (meter) or Account No. 070-15833. Further, the subdivider or lot owner(s) of the designated lot assigned the water service shall not "interconnect" or share the water service with any lots created by the subdivision without a water service or abutting TMK property.
2. The subdivider or current owner shall apply for water meter(s) from the Kapoho Kai Water Association (KKWA) for the lot not serviced by the County. The subdivider shall comply with all terms and conditions for water service required by KKWA, and including the installation of the water meter, prior to county granting final subdivision approval to SUB 08-000750.

3. The subdivider-owner, assigns, or successors shall file a written agreement or approved written document with the Planning Department prior to final subdivision approval of SUB 08-000750. This written agreement, which shall contain the following deed language, being covenants, conditions, and restrictions affecting the proposed lot not serviced by a County water system 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 08-000750. 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 applicant or subdivider agrees and accepts the fact that the County will not, at this time, bear the responsibility to supply public water to the proposed or affected additional lot created by SUB 08-000750 not serviced by a County water system.
 - c. 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.
 - d. In the event that the County notifies the owner(s) of any lot created by SUB 08-000750 that the County Water System has been upgraded, or an improvement district initiated to enable service to those lots, they 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.

Road Variance Conditions

1. The subdivider, owners, their assigns, or successors understand that the both lots arising out of SUB 08-000750 will use and maintain the privately-owned road and any utility easement on their own without any expectation of governmental assistance to maintain the existing access/roadway improvements, including grassed shoulders, within and upon the 40 feet wide rights-of-way identified on

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the subdivision's preliminary plat map, or any other necessary access and utility easement(s) within the proposed subdivision.

2. The current owner(s) or future owner(s) of the lots created by proposed SUB 08-000750 agree to participate in any current Homeowner or maintenance agreement or pay their fair share to maintain the current access driveways and section of privately-owned within the Vacationland Hawaii Subdivision, including grassed shoulders, fronting the proposed subdivision.

Should any of the foregoing stated conditions not be complied with, the Planning Director may proceed to declare subject Variance (VAR 10-022) null and void.

Sincerely,



BJ LEITHEAD TODD
Planning Director

gs:wy:mad

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cc: Murray Lapides (opponent)
DPW – Engineering
DWS – Engineering
SUB 08-000750
VAR 10-022
TMK File