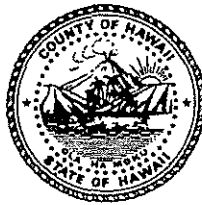


William P. Kenoi
Mayor



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
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October 21, 2010

Mr. Steven S. C. Lim
Carlsmith Ball LLP
P.O. Box 686
Hilo, Hawai'i 96721-0686

Dear Mr. Lim:

SUBJECT: VARIANCE: VAR 10-026
Applicant: STEVEN C. WILCOX
Agent: STEVEN S.C. LIM, CARLSMITH BALL LLP
Owner: STEVEN & MAVOURNEEN WILCOX AND COLLINS FAMILY TRUST
Request: Variance from Chapter 23, Subdivisions, Article 6, Division 2, Improvements Required, Section 23-84, Water Supply, (1)(2)
Tax Map Key: 7-6-002:020, (SUB 09-000861)

After reviewing your variance application, the Planning Director certifies the **approval** of Variance-VAR 10-026 subject to variance conditions. The variance permits proposed 3-lot subdivision (SUB 09-000861) 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, Article 6, 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, containing approximately 16.13 acres, situated at Hōlualoa, District of North Kona, Island and County of Hawai'i, being Tax Key designation (3)7-6-002:02.

2. **Zoning.** The subject property is zoned Agricultural – 5 acres (A-5a) and Agricultural – 20 acres (A-20a) by the County and designated Agriculture (“A”) by the State Land Use Commission (LUC).
3. **Subdivision Request/PPM.** The applicants/owners submitted a subdivision application (SUB 09-000861) and preliminary plat map (PPM), dated June 1, 2009, proposing to subdivide subject property into three (3) lots.
4. **Variance Application.** The applicant submitted the variance application on July 29, 2010.
5. **Agency Comments and Requirements-VAR 10-026:**
 - a. The State Department of Health (DOH) memorandum dated September 13, 2010 (refer to memorandum in variance file).
 - b. Department of Water Supply letter dated September 29, 2010 (refer to letter in variance file).
 - c. The Hawai‘i County Fire Department memorandum dated September 27, 2010 (refer to memorandum in variance file).
6. **Notice to Surrounding Owners.** The applicant submitted an affidavit, dated September 28, 2010, of notification to surrounding property owner(s) within 300 feet of the subject property. Notice of this application was published in the Hawai‘i Tribune Herald and West Hawai‘i Today on September 17, 2010.
Posted Sign. The applicant submitted an affidavit, dated August 11, 2010, regarding sign posted on the subject property and photograph of the posted sign.
7. **Comments from Surrounding Property Owners or Public.**
 - a. Objection letter received on September 21, 2010, and signed by Larry W. Jose.

Therefore, after considering the variance application and background information, including rainfall information provided by the applicant and agency comments, the Planning Director has determined that there are special or unusual circumstances applying to the subject 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

There are no other reasonable alternatives in resolving the difficulty of the applicant. The first alternative would require the applicant to construct extensive improvements and additions, including source, storage, transmission, booster pumps, and distribution facilities. The second alternative would be to design, drill and develop private wells and install the necessary water system improvements in accordance with DWS standards.

As such, the imposition of improving the existing public water system or providing an approved alternative water system for the proposed subdivision would be putting excessive demands upon the applicant 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 utilize privately-owned individual rain water catchment systems for proposed 3-lot subdivision, can meet the intent and purpose of the Subdivision Code according 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 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 variance information and rainfall data submitted by the applicant indicates the subject property and surrounding areas receive adequate rainfall to support individual or separate private rainwater catchment systems for potable and emergency uses. The information submitted by the applicant compared with isohyet maps in the Planning Department denotes the subject property and surrounding areas receive 60 to 80 inches of annual rainfall. The analysis of the rainfall information submitted by the applicant compared with rainfall data and maps in the Planning Department indicate the proposed 3-lot subdivision will receive more than 60 inches of rainfall annually. Therefore, proposed subdivision meets Rule No. 22-Water Variance.

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 materially 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 a proposed 3-lot subdivision of the subject 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. **WATER VARIANCE:** The owners, their 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 09-000861. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting 3 lots not serviced by a County water system of pending 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 owners agree and accept the fact that a County dedicable public water system is not now able to service the proposed subdivision SUB 09-000861. 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 owners agree and accept the fact that the County will not, at this time,

bear the responsibility of supplying public water to the proposed or affected additional lots created by SUB 09-000861 not serviced by a County water system. No further subdivision of the lots created by SUB 09-000861 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.

- c. Any lots created by SUB 09-000861 may not be made subject to a condominium property regime (CPR).
- d. Any dwelling constructed on a proposed 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 firefighting 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. 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 firefighting 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 the lot(s) created by SUB 09-000861 that the County Water System has been upgraded or an improvement district initiated to enable service to these lots, the owner(s) of the lot(s) 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 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. 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. No other variance from Chapter 23, Subdivisions, shall be granted to permit subdivision application SUB 09-000861.
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 the subject Variance Permit (Var-10-026) null and void.

Sincerely,



BJ LEITHEAD TODD
Planning Director

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xc: Manager-DWS
DPW - Engineering Division
SUB 09-000861
Mr. Larry W. Jose