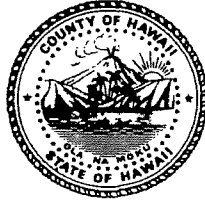


William P. Kenoi  
Mayor



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 5, 2011

Chrystal Thomas Yamasaki, L.P.L.S.  
Wes Thomas Associates  
75-5749 Kalawa Street  
Kailua-Kona, HI 96740-1817

Dear Ms. Yamasaki:

**SUBJECT: VARIANCE VAR 10-049**  
**Applicants: WES THOMAS ASSOCIATES**  
**Owners: KENNETH AND DELTA ONO**  
**Request: Variance from Chapter 23, Subdivisions**  
**Tax Map Key: 8-1-002:003 (SUB 09-000912)**

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After reviewing your variance application, the Planning Director certifies the approval of **VAR 10-049** subject to variance conditions. The variance permits a 2-lot subdivision (SUB 09-000912) of the referenced TMK property to be created without providing a water supply system and dedicable roadway improvements pursuant to Chapter 23, Subdivisions. 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 street, Section 23-93, Street lights, Section 23-94, Street name and traffic signs, and Section 23-95, Right-of-way improvement.

### BACKGROUND

1. **Location.** The subject property, containing approximately 41,905 square feet, being a portion of Grant 2910 to John Yates, is situated at Kalukalu 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup>, South Kona, Hawai'i Island and County of Hawai'i, being Tax Key designation (3)8-1-002:003.
2. **Zoning.** The subject property is zoned Single Family Residence – 15,000 sq. ft. (RS-15) by the County and designated Urban "U" by the State Land Use Commission (LUC).

**APR 7 2011**

3. **Subdivision Request/PPM.** The applicant/s/owner's agent submitted subdivision application (SUB 09-000912) proposing to subdivide subject property. The PPM, dated June 24, 2009 from Wes Thomas Associates, denotes the two existing single family residential dwellings with water tanks. Further action on the subdivision application including the preliminary plat map (PPM) is being deferred according to letter dated August 19, 2009 in the subdivision file.
4. **Variance Application.** The subject variance application was acknowledged by Planning Department letter dated December 20, 2010. The variance application includes agent's background information and request for variance from water supply and dedicable roadways required to allow proposed 2-lot subdivision.
5. **Agency Comments and Requirements:**
  - a. The State of Hawaii Department of Health (DOH) memorandum dated December 23, 2010. (Refer to memorandum in the variance file).
  - b. The County of Hawai'i Fire Department (HFD) memorandum dated January 4, 2011. (Refer to memorandum in variance file).
  - c. The County of Hawaii Department of Water Supply (DWS) memorandum dated January 14, 2011, which identifies no opposition to the use of catchment. Per prior memo dated August 26, 2009 (in subdivision file) the property is outside the DWS service limits and would require extensive improvements to serve the property. (Refer to memorandum in variance file).
  - d. The County of Hawaii Department of Public Works memorandum dated February 8, 2011. (Refer to memorandum in variance file).
6. **Public Notice.** The applicant submitted a copy of a notice sent to a list of surrounding property owner(s), and other submittals. Pursuant to these submittals, it appears that the applicant's notice was mailed to the surrounding property owners by USPS on December 28, 2010. In accordance with Ordinance No. 05-135, the applicants submitted a notarized affidavit, dated January 7, 2011 and photographs to confirm posting of required sign. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on December 28, 2010.

7. **Comments from Surrounding Property Owners or Public.** No other agency comments were received. No written objections to the variance application were received from surrounding property owners or public.

#### **REVIEW CRITERIA**

Sections 23-14 and 25-2-50 of the County Code provide the Director with the general authority to grant variances. Said sections state the following:

“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.

Sections 23-15 and 25-2-51 state 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 is consistent with the general purpose of the district, the intent and purpose of this chapter, and the 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.

#### **ALTERNATIVES/SPECIAL AND UNUSUAL CIRCUMSTANCES**

**Water Supply.** The first alternative requires the applicant or owners to extend and/or construct a county water system and provide dedicable water system improvements in accordance with DWS standards. The second alternative would be to design, drill and develop private wells and install the necessary water system improvements in accordance with DWS standards.

The requirement of extending or constructing a DWS water system, or providing an approved alternative private water system meeting DWS standards, for the proposed 2-lot subdivision would be putting excessive demands upon the applicant or owners when a more reasonable alternative is available (e.g. private individual rainwater catchment system for potable and emergency needs).

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Wes Thomas Associates  
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**Lot Access/Roadways.** The subdividers have been requested to construct access and roadways pursuant to an earlier DPW memorandum dated September 4, 2009, or roadway requirements pursuant to Chapter 23, Subdivisions. The subject property currently has access to a public roadway (Hawaii Belt Road), via Konawaena School Road, portion of which is County-maintained and the balance being an easement administered by the State (TMK: 8-1-005:011), then by private easements/roads through TMK: 8-1-005:024 & 25, 8-1-002:011, and 8-1-002:077 and 078.

In lieu of improving or constructing roadways required by the DPW, the developer or owners contend that the existing paved private roadway is sufficient access to subject property. The additional lot to be created by the proposed subdivision will create minimal additional impact, specifically since both dwellings are existing. The owners are requesting a variance to not construct roadways, including 20 feet wide dedicable pavement with paved shoulders and swales within a minimum 50 feet wide right-of-way and street lights, required by the DPW memorandum.

#### **INTENT AND PURPOSE OF THE SUBDIVISION CODE**

**Water Variance.** The intent and purpose of requiring a water system for and within the proposed subdivision or development 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

Certain properties seeking a variance from general water-related infrastructure improvements may qualify for relief under Planning Department Rule 22 – Water Variance. Rule 22 was drafted, in part, due to the State Department of Health having 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. Rule 22 provides criteria to be used so that consistent decisions are made on water variance requests.

Rule 22 pertains to properties that are agriculturally-zoned, limits subdivisions requesting a variance from water supply to six (6) lots, and requires minimum rainfall for rainwater catchment systems. 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 existing rainfall within the subject property provided by the applicant indicates that there is adequate rainfall to support individual or separate private rainwater catchment systems for potable and emergency uses. The analysis of the applicant's submittals and GIS rainfall data maintained by Planning Department indicated the proposed subdivision will receive at least 60 - 80 inches of rainfall annually. Although not agriculturally zoned, the proposed 2-lot subdivision falls under the lot number threshold and receives the necessary minimum annual rainfall.

**Roadway Variance.** The intent and purpose of access requirements to a proposed subdivision is to ensure legal and physical access to the proposed lots that is 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.

According to our records, the existing subdivision was established in 1933, creating 10 residential lots and a roadway lot. The maintenance cost to utilize and maintain the privately-owned paved roadway and access easement will continue to be privately addressed and shared among the current owners and users. The subject property is presently improved with two (2) single family dwellings conforming to the Single-Family Residence – 15,000 square feet (RS-15) zoning.

Therefore, given the unusual circumstances cited by the applicant and evaluation of the request to improve the roadways, required by the Department of Public Works, the Planning Director has concluded that the current roadway is sufficient access to accommodate the additional lot created by the subdivision.

The subject variance application was acknowledged by letter dated December 20, 2010. Additional time was requested by the Planning Department to review the variance application and other information submitted supporting the variance application. The applicant granted the Planning Department and Planning Director an extension of time to decide on the 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 Hawaii County General Plan. Furthermore, it is felt that the applicant's request for variance from water supply and dedicable roadway improvements or request to construct privately owned roadways or driveways within and upon current access easements upon abutting properties will not be materially detrimental to the public's welfare and does not cause substantial adverse impact to the area's character and to adjoining properties.

**DETERMINATION/VARIANCE CONDITIONS**

The variance request to permit proposed 2-lot subdivision of the subject property 1) without providing a water system meeting DWS standards and 2) without roadway improvements required by DPW is hereby **approved subject to following variance conditions:**

**General Conditions:**

1. The applicant, subdivider, owners, their assigns, or successors shall be responsible for complying with all stated conditions of approval. The term "applicant" in the following conditions is further understood to collectively mean the applicant, subdivider, owners, their assigns, or successors.
2. The subdivision application's (SUB 09-000912) 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 variances from Chapter 23, Subdivisions, shall be granted to permit subdivision application SUB 09-000912.
3. The applicant acknowledges 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.
4. No further subdivision of any lots created by SUB 09-000912 is permitted unless county water system requirements pursuant to Chapter 23, Subdivisions, are met.
5. No condominium property regime (CPR) shall be permitted on any lots created by SUB 09-000912.
6. No Planning Department or Building Division permits shall be issued to allow construction of an "ohana" dwelling on the subject 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.

7. The applicant 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. The applicant shall file a written agreement or approved written document with the Planning Department prior to final subdivision approval of SUB 09-000912. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting the lots not serviced by a County water system 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 applicant agrees and accepts that a County dedicable public water system is not now able to service the proposed subdivision (SUB 09-000912). 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 agrees and accepts 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 09-000912 not serviced by a County water system. No further subdivision of the lots created by SUB 09-000912 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
  - 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, 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 the lot(s) created by SUB 09-000912 that the County Water System has been upgraded or an

improvement district initiated to enable service to the lots created by SUB 09-000912, the owner(s) of the lot(s) created by SUB 09-000912 shall participate in such improvement district or shall pay their pro-rata share of any installation of laterals, as determined by the County Department of Water Supply (DWS).

**Road Variance Conditions:**

1. The applicant understands that the 2-lots arising out of SUB 09-000912 will use and maintain the privately owned roadways and/or necessary easement(s) on their own without any expectation of governmental assistance to maintain the current privately owned access or roadway improvements within and upon Konawaena School Road identified on the subdivisions preliminary plat map or any other necessary access and any necessary utility easement(s) within or upon proposed lots or proposed subdivision. The applicant, owners, their assigns, or successors shall submit or file a written agreement or approved written document with the Planning Department prior to receipt of final subdivision approval of SUB 09-000912. The proposed lots are required to join or participate with a Homeowner or Road Association or include appropriate deed language, being covenants, conditions, and restrictions, which affect the entire property and/or proposed lots arising from the approval of the pending subdivision application and 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 applicant:
  - a. The applicant shall indemnify and defend the State of Hawai'i or County of Hawai'i from any and all liability arising out of vehicular access to and from the subject property utilizing the current privately-owned roadway fronting the subject property.
  - b. Upon written demand of the County of Hawai'i, the applicant and/or owners, their assigns, or successors shall agree to participate and pay their fair share percentage of any improvement district adopted for the purpose of roadway improvements serving the proposed lot(s) arising out of SUB 09-000912 or/and the privately-owned right-of-way "Konawaena School Road". Should the improvement district require acquisition of any other privately owned rights-of-way upon abutting properties, such rights-of-way shall be dedicated to the County without cost and the value of the dedication credited to the fair share contribution of the respective lot owner(s). Should the Council adopt a Unified Impact Fees Ordinance



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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.

- c. The future lot owner(s) agree to participate in any road maintenance agreement or/and pay their fair share to maintain Konawaena School Road and/or maintain the privately-owned roadway(s) between Konawaena School Road and the proposed subdivision.

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

Thank you for your understanding and patience during our review.

Sincerely,



BJ LEITHEAD TODD  
Planning Director

GES:LHN:nci  
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xc: DPW-Engineering Branch  
DWS-Engineering Branch  
SUB 09-000912