

William P. Kenoi
Mayor



BJ Leithead Todd
Director

Margaret K. Masunaga
Deputy

West Hawai'i Office
74-5044 Ane Keohokalohe Hwy
Kailua-Kona, Hawai'i 96740
Phone (808) 323-4770
Fax (808) 327-3563

County of Hawai'i
PLANNING DEPARTMENT

East Hawai'i Office
101 Pauahi Street, Suite 3
Hilo, Hawai'i 96720
Phone (808) 961-8288
Fax (808) 961-8742

March 27, 2012

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

Dear Ms. Yamasaki:

SUBJECT: Application: VAR 11-000063
Applicant: WES THOMAS ASSOCIATES
Owner: WILLIAM B. MCCLATCHY
(LALAKEA FARMS, LLC)
Request: Variance from Chapter 23, Subdivisions,
Article 6, Division 2, Improvements Required,
Section 23-84, Water Supply, (1)(2)
Tax Map Key: 4-7-007:091 (SUB 11-001096)

After reviewing the subject variance application, the Planning Director certifies the **approval** of VAR 11-063 to allow proposed 3-lot subdivision (SUB 11-001096) without providing a water supply system required by 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).

The Planning Director has concluded that the variance from the minimum subdivision water system requirements be **approved** based on the following findings:

BACKGROUND

1. **Location.** The subject property contains approximately 202.387 acres, is located on the westerly end of Waikokoe Road, at Lalakea, 'Ili Kuponono of Waipi'o, Hāmakua, Hawai'i.



2. **Zoning.** The subject property is zoned Agricultural – 40 acres (A-40a) 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-11-001096) and preliminary plat map (PPM), dated March 30, 2011, proposing to subdivide subject property into three (3) lots.
4. **Variance Application.** The applicant submitted the variance application and associated materials on December 23, 2011.
5. **Agency Comments and Requirements.**
 - a. The State Department of Health (DOH) memorandum dated January 18, 2012 (refer to memorandum in variance file).
 - b. The Hawai‘i County Fire Department (HFD) memorandum dated January 20, 2012 (refer to memorandum in variance file).
 - c. The Department of Water Supply memorandum dated October 26, 2011 states: *“We have reviewed the subject application and our comments from our memorandum to you, dated November 29, 2011, regarding the subject subdivision application still stand. As the subject parcel was created by SUB 09-000926, the conditions of VAR 09-000055 still apply. Please refer to the Condition No. 3b, the subdivision of the subject parcel will not be permitted until County Water system and other Requirements of Chapter 23, subdivisions, are met.*

Should there be any questions, please contact Mr. Ryan Quitariano of our Water Resources and planning Branch at 961-8070, extension 256.
6. **Public Notice.** The applicant has submitted a copy of the notice, 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 January 20, 2012. In accordance with Ordinance No. 05-135, the applicants submitted notarized affidavit, dated February 28, 2012, and photograph to confirm posting of required sign. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on January 24, 2012.
7. **Comments from Surrounding Property Owners or Public.** No other agency comments were received and no objections were received from surrounding property owners or the public.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The subject property was created by Subdivision 09-000926 which was a court-ordered, In-Kind Subdivision (Civ. No. 07-01-316K, McClatchy v. Sullivan). Variance 09-055 (VAR-09-055) was issued to allow for the two (2) lot subdivision without providing a water system meeting the minimum requirements of the County Department of Water Supply. Although Condition 3b of VAR 09-000055 states that no further subdivision of the lots created by SUB 09-000926 will be permitted unless county water system requirements and other requirements of Chapter 23, subdivisions are met. Condition h of the **Declaration of Variance (Variance – VAR 09-000055)** which was recorded with the Bureau of Conveyance of August 6, 2010 (DOC 2010-113441) states: *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 deprives 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 beyond a total of six lots (three lots on each of the two resulting 200 plus acre parcels), provided any further subdivision otherwise qualifies under all other applicable statutory and regulatory requirements, 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.*

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 based on the Court-Ordered, In Kind Subdivision (Civ. No. 07-01-316K McClatchy v Sullivan), special or unusual circumstances apply to the subject 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

There are no other reasonable alternatives in resolving the difficulty of the applicant. The first alternative requires the applicant to construct extensive improvements and additions to include 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.

Ms. Chrystal Thomas Yamasaki
Wes Thomas Associates
Page 4
March 27, 2012

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

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.

An alternative to a public water system would be the approval of a water variance to utilize privately-owned individual rain water catchment systems for the proposed 3-lot subdivision, which 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. Rule 22 also specifies a requirement for minimal rainfall as follows:

“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 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 approximately 80 inches to 120 inches of rainfall annually. Therefore, proposed subdivision meets Rule No. 22-Water Variance.

The applicant's variance application was acknowledged by letter dated January 17, 2012 and additional time to review the application was required. The applicant granted the Planning Department and Planning Director an extension of time for decision on the Variance Application to March 31, 2012.

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.

PLANNING DIRECTOR'S DECISION AND VARIANCE CONDITIONS

The variance request to allow a proposed 3-lot subdivision of the subject property without providing a water system meeting DWS standards to one of the 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 prior to receipt of final subdivision approval of SUB 11-001096. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting the lot(s) not serviced by a County water system of the 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 11-001096. 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 lot(s) created by SUB 11-001096 not serviced by a County water system. No further subdivision of the lots created by SUB 11-001096 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
 - c. All lots created by SUB 11-001096 may not be made subject to a condominium property regime.
 - 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 minimum 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. Therefore, a total of 9,000 gallon water storage capacity shall be installed on the property. 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 11-001096 that the County Water System has been upgraded or a 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

Ms. Chrystal Thomas Yamasaki
Wes Thomas Associates
Page 7
March 27, 2012

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 11-001096.
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 null and void.

Sincerely,



BJ LEITHEAD TODD
Planning Director

LHN: nci

O:\Variances\Zone4\VAR11-063WaterTMK4-7-007-091McClaatchy(LalakeaFarmsLLC).doc.rtf

Enc: Declaration of Variance (VAR-09-000055)

xc: Real Property Tax Office (Hilo)
Manager-DWS
DPW - Engineering Division
SUB 11-001096