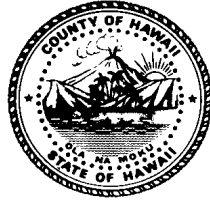


Mitchell D. Roth
Mayor

Lee E. Lord
Managing Director

West Hawai'i Office
74-5044 Ane Keohokalole Hwy
Kailua-Kona, Hawai'i 96740
Phone (808) 323-4770
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County of Hawai'i
PLANNING DEPARTMENT

Zendo Kern
Director

Jeffrey W. Darrow
Deputy Director

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

April 18, 2022

Mr. Daniel Berg, LPLS
dlb & Associates
P.O. Box 49-2281
Kea'au, HI 96749

Dear Mr. Berg:

SUBJECT: Application: SUBDIVISION VARIANCE | PL-SVAR-2022-000011
Applicant: DANIEL BERG, LPLS, DLB & ASSOCIATES
Owners: MARLOW FAMILY TRUST, MARY JANE
Request: Variance from Chapter 23, Subdivisions, Article 6,
Division 2, Improvements Required, Section 23-84,
Water Supply
Tax Map Key: (3) 1-7-024:051 (PL-SUB-2021-000022)

Upon review of your variance application, the Planning Director certifies the **Approval** of Variance PL-SVAR-2022-000011, subject to variance conditions. The variance grants relief for PL-SUB-2021-000022 from constructing minimum County dedicable water supply system improvements for one (1) of the two (2) lots as required by Hawai'i County Code (HCC), Chapter 23 (Subdivisions).

The variance is from the proposed subdivision's minimum requirements pursuant to HCC, Chapter 23 (Subdivisions), Article 6, Division 2, Improvements Required, Section 23-84, Water Supply, (1)(2).

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dlb & Associates
April 18, 2022
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BACKGROUND

1. **Location.** The referenced property, Lot 1, Kukui Heights Lots, Being A Portion of Lot 'Ōla'a Reservation Lots, also Being a Portion of Grant 4419, containing a total of approximately 48,750 sq. ft., is situated in 'Ōla'a, Puna, Hawai'i.
2. **County Zoning.** Residential & Agricultural, ½ acre (RA-.5a).
3. **State Land Use.** Rural (R).
4. **General Plan.** Land Use Pattern Allocation Guide (LUPAG) map designates the property as Rural (rur).
5. **Subdivision Code Requirements.** The subdivision code requires that subdivisions be served by a water system meeting the minimum requirements of the County Department of Water Supply (DWS) and be provided with water mains and fire hydrants installed to and within the subdivision in accordance with the rules and regulations of the DWS.
6. **Subdivision Request/PPM.** Subdivision Application PL-SUB-2021-000022 was submitted to subdivide the subject TMK property into 2 lots. Further action on the Subdivision Application has been deferred pursuant to letter of February 2, 2022, in the subdivision file.
7. **Variance Application.** The variance request from water supply improvements for one (1) of two (2) lots was acknowledged by Planning Department letter dated February 15, 2022. This Variance Application includes background history and circumstances and information regarding the pending Subdivision Application. Please be informed that the property is served by one meter, but the Department of Water Supply cannot provide an additional water service for the proposed 1 more lot.
8. **Agency Comments and Requirements.**
 - a. State of Hawai'i-Department of Health (DOH): See attached memoranda dated February 22, 2022. **(Exhibit A)**
 - b. County of Hawai'i Fire Department (HFD): No comments received.
 - c. Department of Water Supply (DWS): See attached memoranda dated March 22, 2022. **(Exhibit B)**

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April 18, 2022
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9. **Notice to Surrounding Owners/Posted Sign.** The applicant submitted evidence, dated January 17, 2022, regarding the posting of a public notification sign on the subject property pursuant to Section 23-17(c) of the Hawai'i County Code (HCC). Pictures of the posted sign was also submitted. The evidence also indicates that a notice of the application was served upon the surrounding property owners as required by Section 23-17(a).
10. **Comments from Surrounding Property Owners or Public.** There were no comments received from any neighbors or the public.
11. **Time Extension.** The applicant's Variance Application was received on February 16, 2022; and additional time to review the application was required. The applicant granted the Planning Director an extension of time to issue a decision on the Variance Application until January 29, 2020.

ANALYSIS OF GROUNDS FOR VARIANCE

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.*

The Variance Application meets criterion (a) for the following reasons(s):

The subdivision request is for two (2) lots in keeping with the existing RA-.5a zoning. Although a dedicable water system is a requirement of the code, the DWS indicates that the property is beyond the service limits of their existing water system, and it would be unreasonable for the subdividers alone to shoulder the costs associated with extending/upgrading the DWS system to service the subject subdivision and one (1) of its two (2) lots. It would be unreasonable to expect the owners to construct the required service facilities upgrades and extensions to serve the lot. The request is for only one (1) of the two (2) lots, so this variance request is reasonable. Therefore, in lieu of constructing water system improvements to either extend/upgrade the DWS facilities or provide a private water system to DWS standards for the pending 2-lot subdivision, a more reasonable alternative can be allowed through Rule 22, Water Variance. The above special and unusual circumstances would deprive the applicant from developing this property and interferes with the best use of this property.

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April 18, 2022
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Therefore, for this 4-lot subdivision, the best use and manner of the development allows for individual rainwater catchment system in keeping with the rural, agricultural character of the area.

(b) *There are no other reasonable alternatives that would resolve the difficulty.*

The Variance Application meets criterion (b) for the following reasons(s):

The DWS has indicated that the existing water system is unavailable to serve the additional 3 lots; and the existing water system facilities cannot any further support water service to the subdivision. Constructing water system improvements to extend the DWS facilities or provide a private water system to DWS standards for the pending 2-lot subdivision would be placing excessive demands upon the applicant because of the extensive improvements and additions required to upgrade the existing DWS water system facilities. And, at an elevation of approximately 1,200 feet above sea level, the drilling of wells and construction of other water system improvements to DWS standards would also be unreasonable for this subdivision.

(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.*

The Variance Application meets criterion (c) for the following reasons(s):

Given that there is adequate rainfall (approximately 140 – 160 inches annually) to support individual water catchment for the lots, the granting of this variance would be consistent with the general purpose of the District. Water catchment is consistent with the intent of the policies of the General Plan in that it will further housing and agricultural production opportunities in this agricultural area. Water catchment will not be materially detrimental to the public welfare as it serves only private parties.

Subject to conditions, granting of the variance will not cause substantial, adverse impact to the area's character or to adjoining properties. The collection of rainwater could help to reduce runoff and may be a benefit to the surrounding area.

Given that the subject area receives sufficient annual rainfall, a water variance would be consistent with the general purpose of the zoning district and the intents

Mr. Daniel Berg, LPLS
dlb & Associates
April 18, 2022
Page 5

and purposes of the Zoning Code, Subdivision Code and the Hawai'i County General Plan.

DETERMINATION-VARIANCE CONDITIONS

The Variance to permit the proposed 2-lot subdivision of the subject TMK property without providing dedicable water system improvements meeting DWS standards, is hereby **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. 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.
3. The owners, their assigns, or successors shall file a written agreement document with the Planning Department within one (1) year from the issuance of tentative subdivision approval. This written agreement shall contain deed language, being covenants, conditions, and restrictions affecting the lots created by the proposed subdivision which is not serviced by a County dedicable public water system.

The agreement shall be duly recorded at the State of Hawai'i, Bureau of Conveyances by and at the cost and expense of the owners. A copy of the recorded document shall be supplied to the Planning Department for our files.

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 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 of the existing property or approved subdivided lots.

4. The subdivider and all grantees, successors, and assigns acknowledge that the parcels were created by a variance, from the normal subdivision requirements of Hawai'i County, and that there are no longer any special or unusual circumstances applying to the property, and hence, no grounds exist or will exist for another variance from the Subdivision Code to permit further subdivision of the properties, unless County dedicable public water system requirements and other requirements of HCC Chapter 23, Subdivisions, are met.

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dlb & Associates
April 18, 2022
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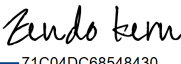
5. The owners, grantees, successors, and assigns agree and accept the fact that a County dedicable public water system, will not be extended, to serve the lots within proposed subdivision PL-SUB-2021-000022.
6. The owners, grantees, successors, and assigns agree and accept the fact that the County will not bear the responsibility of supplying public water to the subdivided lots. No further subdivision of the lots will be permitted unless County dedicable public water system requirements and other requirements of HCC Chapter 23, Subdivisions, are met.
7. No condominium property regime will be allowed, nor will an 'Ohana Dwelling Unit be permitted or allowed.
8. Any dwelling constructed on any created lot not served by the DWS, shall be provided with, and maintain a private rainwater catchment system, which includes a minimum 6,000-gallon water storage capacity for domestic consumption or potable uses. This private water storage system shall adhere to the University of Hawai'i's College of Tropical Agriculture and Human Resources' "Guidelines on Rainwater Catchment Systems for Hawai'i," as well as the DOH requirements related to water testing and water purifying devices.
9. In addition to the 6,000-gallon water storage capacity for domestic consumption or potable uses, each permitted dwelling on a lot, not served by the DWS, shall also be provided with a **minimum** 3,000-gallon water storage capacity dedicated for firefighting and emergency purposes. The location and capacity of the emergency water supply system, including the necessary compatible fire apparatus connector system and access routes, shall meet with the approval of the HFD. The HFD also advises, as a precautionary measure for other uninhabited structures, that consideration be given to the provision of a similar water storage system for firefighting and emergency purposes.
10. In the event that the County notifies the owner(s) of the lot(s) created that the County water system has been upgraded or an improvement district initiated to enable service to the lots, the owner(s) of the lots shall participate in such improvement district or shall pay their pro-rata share of the upgrade and installation of laterals, as determined by the DWS.
11. The pending subdivision application's (PL-SUB-2021-000022) final plat map shall meet all the requirements of the Hawai'i County Zoning Code and the Subdivision Code that are not covered by this variance.
12. 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

Mr. Daniel Berg, LPLS
dlb & Associates
April 18, 2022
Page 7

ordinances pertaining to building improvements, land use and the public's health, safety and welfare.

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

Sincerely,

DocuSigned by:

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ZENDO KERN
Planning Director

LHN:cn

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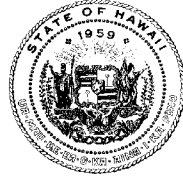
Enclosures: Agency Comments, Exhibits A-B

cc: DWS-Engineering Branch
HFD
PL-SUB-2021-000022

cc w/encls: Mary Jane Marlow (maryjmarlow@gmail.com)

G. Bailado, GIS Section (via email)

DAVID Y. IGE
GOVERNOR OF HAWAII



ELIZABETH A. CHAR, M.D.
DIRECTOR OF HEALTH

STATE OF HAWAII
DEPARTMENT OF HEALTH
P.O. BOX 916
HILO, HAWAII 96721-0916

MEMORANDUM

DATE: February 22, 2022

TO: Mr. Zendo Kern
Planning Director, County of Hawaii

FROM: Eric Honda
District Environmental Health Program Chief

SUBJECT: Application: SUBDIVISION VARIANCE PL-SVAR-2022-000011
Applicant: DANIEL BERG, LPLS, DANEIL BERG, LPLS
Owner: MARLOW FAMILY TRUST, MARY JANE
Request: Variance from Chapter 23, Article 6, Section 23-84, Water Supply
TMK: 1-7-024:051 (PL-SUB-2021-000022)

Public Water Systems: The Department of Health's Safe Drinking Water Branch authority on drinking water quality is based on the definition of a "public water system." Federal and state regulations define a public water system as a system that serves 25 or more individuals at least 60 days per year or has at least 15 service connections. All public water system owners and operators are required to comply with Hawaii Administrative Rules, Chapter 11-20 (HAR 11-20), and titled "Rules Relating to Public Water Systems". All public water systems are regulated by the Department of Health and shall be in compliance with the Hawaii Administrative Rules, Title 11, Chapter 20. Recommend the subdivision lots be connected to an existing public water system.

Concerns on water quality for lead, copper, algae and microbiological and chemical contaminations in private water systems have identified the need for self monitoring. The Department of Health does not support the use of these private rain catchment systems for drinking purposes since the quality may not meet potable water standards.

All new public water systems are required to demonstrate and meet minimum capacity requirements prior to their establishment, per HAR 11-20-29.5, titled "Capacity Demonstration and Evaluation." This requirement involves demonstration that the system will have satisfactory technical, managerial and financial capacity to enable the system to comply with safe drinking water standards and requirements.

Projects that propose development of new sources of potable water serving or proposed to serve a public water system must comply with the terms of HAR 11-20-29. This section requires that

Zendo Kern
February 24, 2022
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all new public water system sources be approved by the Director of Health (Director) prior to its use. Such approval is based primarily upon the submission of a satisfactory engineering report which addresses the requirements specified in HAR 11-20-29.

The engineering report must identify all potential sources of contamination and evaluate alternative control measures which could be implemented to reduce or eliminate the potential for contamination, including treatment of the water source. In addition, water quality analyses for all regulated contaminants, performed by a laboratory certified by the State Laboratories Division of the State of Hawaii, must be submitted as part of the report to demonstrate compliance with all drinking water standards. Additional parameters may be required by the Director for this submittal or additional tests required upon his or her review of the information submitted.

All sources of public water system sources must undergo a source water assessment which will delineate a source water protection area. This process is preliminary to the creation of a source water protection plan for that source and activities which will take place to protect the source of drinking water.

Projects proposing to develop new public water systems or proposing substantial modifications to existing public water systems must receive construction plans approval by the Director prior to construction of the proposed system or modification in accordance with HAR 11-20-30, titled "New and Modified Public Water Systems". These projects include treatment, storage and distribution systems of public water systems. The approval authority for projects owned and operated by a County Board or Department of Water or Water Supply has been delegated to them.

All public water systems must be operated by certified distribution system and water treatment plant operators as defined by HAR 11-25 titled, "Rules Pertaining to Certification of Public Water System Operators".

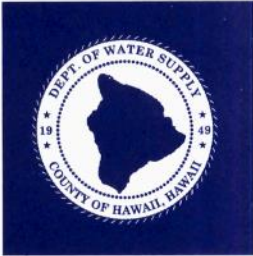
All projects which propose the use of dual water systems or the use of a non-potable water system in proximity to an existing potable water system to meet irrigation or other needs must be carefully design and operate these systems to prevent the cross-connection of these systems and prevent the possibility of backflow of water from the non-potable system to the potable system. The two (2) systems must be clearly labeled and physically separated by air gaps or reduced pressure principle backflow prevention devices to avoid contaminating the potable water supply. In addition backflow devices must be tested periodically to assure their proper operation. Further, all non-potable spigots and irrigated areas should be clearly labeled with warning signs to prevent the inadvertent consumption on non-potable water. Compliance with HAR Chapter 11-21, titled Cross-Connection and Backflow Control is also required.

All projects which propose the establishment of a potentially contaminating activity (as identified in the Hawai'i Source Water Assessment Plan) within the source water protection area of an existing source of water for a public water supply should address this potential and activities that will be implemented to prevent or reduce the potential for contamination of the drinking water source.

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For further information concerning the application of capacity, new source approval, operator certification, source water assessment, backflow/cross-connection prevention or other public water system programs, please contact the SDWB at 586-4258.

EXHIBIT A



DEPARTMENT OF WATER SUPPLY • COUNTY OF HAWAII

345 KEKŪANAŌ'A STREET, SUITE 20 • HILO, HAWAII 96720

TELEPHONE (808) 961-8050 • FAX (808) 961-8657

March 22, 2022

COH PLANNING DEPT
MAR 23 2022 PM 2:32
REC'D HAND DELIVERED

TO: Mr. Zendo Kern, Director
Planning Department

FROM: Keith K. Okamoto, Manager-Chief Engineer

SUBJECT: **Subdivision Variance PL-SVAR-2022-000011**
Applicant: Daniel Berg, LPLS
Owner: Marlow Family Trust, Mary Jane
Tax Map Key (3) 1-7-024:051 (PL-SUB-2021-000022)

We have reviewed the subject application, and our comments to you in our letter dated January 12, 2022, still stand.

Should there be any questions, please contact Mr. Ryan Quitarano of our Water Resources and Planning Branch at (808) 961-8070, extension 256.

Sincerely yours,

Keith K. Okamoto, P.E.
Manager-Chief Engineer

RQ:dfg

copy – Ms. Mary Jane Marlow
Mr. Daniel Berg, LPLS

EXHIBIT B

... Water, Our Most Precious Resource ... Ka Wai A Kāne ...

The Department of Water Supply is an Equal Opportunity provider and employer.