

April 28, 2003

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Dear Mr. Fagundes:

VARIANCE PERMIT NO. 1355 WH (VAR 03-001)

Applicants: LEO FLEMING, C.E./ROBERT RICE, ET AL./
JOSEPH FAGUNDES, III, ESQ.

Owners: ROBERT RICE, ET AL./
DBA KONA HORIZONS, LTD.

Request: Variance from Chapter 23, Subdivisions,
Article 6, Division 2, Improvements Required,
Section 23-84, Water Supply (1) (2)

Tax Map Key: 8-7-014:006 & 011 (SUB 01-0155)

After reviewing your application and the information submitted, the Planning Director is approving your client's variance request for a 45-lot subdivision of the subject TMK property(s) without providing a public or county water system to any lots shown on the subdivision's preliminary plat map (PPM), **subject to conditions**. The applicant, on behalf of the owner requested a variance to allow a 45-lot subdivision of property(s) without providing a water system improvements required by the Hawaii County Code and pursuant to Chapter 23, Subdivisions, Division 2, Improvements Required, Section 23-84, Water Supply, (1) (2).

BACKGROUND AND FINDINGS

1. **Location.** The subject TMK property(s), land consisting of 294 +/- acres, is located at Opihihale 2nd, South Kona, Hawaii.

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The property is zoned Agricultural (A-5a) by the County (Note: The property's zoning was changed from Unplanned (U) to Agricultural (A-5a) when the amendments to the County Zoning Code were ratified by the Council. The property(s) are designated Agriculture "A" by the Land Use Commission (LUC). A portion of the property is located within the County's Special Management Area (SMA).

Note: According to the subdivision background report, the subject property(s) are designated "Orchards" pursuant to the County General Plan (LUPAG Map). Thus, the subject property(s) are generally rocky in character and suitable for macadamia nuts, papayas, citrus and other similar type agricultural crops.

Chapter 23, Subdivisions, and County General Plan.

Chapter 23, Article 6, Division 2, Improvements Required, Section 23-84, Water Supply states "A subdivision to be laid out after December 21, 1966 shall be provided with water as follows:

- (1) A water system meeting the minimum requirements of the County department of water supply; and
- (2) Water mains and fire hydrants installed to and within the subdivision in accordance with the rules and regulations of the department of water supply, adopted in conformity with article VIII of the Charter."

The County General Plan's-"WATER"- Element or "POLICIES", states in part:

"Water system improvements and extensions shall promote the County's desired land use development pattern.

"All water systems shall be designed and built to Department of Water Supply standards.

"The fire prevention systems shall be coordinated with water distribution systems in order to ensure water supplies for fire protection purposes.

"The County shall consider the feasibility, desirability, and the attendant responsibilities of establishing standards for individual water catchment units.

"Water systems shall meet the requirements of the Department of Water Supply

and the Subdivision Control Code.”

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2. **Subdivision Application (SUB 01-0155).** The applicant-owner (Robert Rice, Et al.), submitted a subdivision application (SUB 00-0155) which includes an undated preliminary plat map. Further action on the proposed 45-lot subdivision application has been deferred pending resolve of the subdivision’s water system requirements.
3. **Variance Application-Variance Site Plan Map.** Joseph Fagundes III, Esq., on behalf of the applicants/owners, submitted a revised variance application to the Planning Department.
4. **Agency Comments and Requirements WH (VAR 03-001):**
 - a. The DWS memorandum dated April 4, 2003 states:

“We have reviewed the subject application.

Please refer to our memorandum of January 25, 2002, for subdivision application No. 2001-0155. We have no additional comments to offer.

Should there be any questions, the applicant may contact our Water Resources and Planning Branch at 961-8070.”

Note: The DWS memorandum dated January 25, 2002 in the subdivision application file (SUB 01-0155) states:

“Please be informed that the proposed subdivision is not within the service limits of the Department’s existing water facilities.

The nearest Department of Water Supply water system facility is at the end of an existing 8-inch waterline along the Mamalahoa Highway approximately 7.5 miles from the property.”
 - b. The County of Hawaii Fire Department (HFD) memorandum is dated February 21, 2003. (Refer to memorandum in variance file).

c. The State Department of Health (DOH) memorandum dated
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March 7, 2003 (sic) in the variance file states:

“The Department of Health’s Safe Drinking Water Branch authority on drinking water quality is based on the definition of a “public water system.” A “public water system” means a system which provides water for human consumption through pipe or other constructed conveyance if such system has fifteen (15) service connections or regularly serves an average of at least twenty-five (25) individuals daily at least sixty (60) days out of the year. 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.”

5. **Notice to Surrounding Property Owners.** Pursuant to transmittal letter dated February 18, 2003 and attachments, notice was mailed to surrounding property owners. Proof of mailing said notice of the variance application to surrounding property owners on or about February 18, 2003 was submitted for the record.
6. **Comments from Surrounding Property Owners or Public.** Several telephone calls/inquiries were received from Brian J. De Lima, Esq., on behalf of Stanley Roehrig, a landowner of property adjacent to the subject TMK property(s).

SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant intends to subdivide the existing property(s) to create 45 new lots. No lots will have a water system meeting the requirements of the Subdivision Code.

The property’s zoning requires that a proposed subdivision must result in the creation of lots

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being a minimum 5 acres or larger and subdivision improvements meeting Zoning and Subdivision Codes adopted in 1967. Because of the property's rural location, land character, and other demographic factors and projections for the area, the expectations of development and justification for expenditure of public money to expand or extend the public water infrastructure to the subject property(s) and adjoining areas remain remote at this time. The availability of public money and justification to expand public infrastructure within the district was limited in the 1950's and 1960's. These circumstances and other limitations affecting the property and adjoining areas will remain so for the next 10 to 20 years.

According to the applicant, "The nearest water system is at the end of an existing eight (8) inch waterline along Mamalahoa Highway, approximately nine (9) miles from the subject property. Current funding is insufficient to allow the County Board of Water Supply to extend the existing water distribution system and there are no plans for any waterline extension in the area. To deny the requested variance would deprive the Owners of substantial property rights."

The imposition of water requirements is applied on a uniform basis for subdivision proposals. In this instance the applicant, on behalf of the owners, is requesting a variance to create 45 new lots with a condition that private water catchment systems be allowed for potable and emergency needs for 45 household spread out over nearly 300 acres and that a private well be utilized to provide water to the proposed 45-lots. Current rainfall (mean rainfall) information shows the property(s) receive approximately 41 inches of rainfall annually.

The owner has developed a well and obtained a pump installation permit from the Commission on Water Resources Management allowing 65 gpm (93,600 gpd) capacity pump. The owner also has pump test data showing that the water well water is of potable quality.

Therefore, considering the variance background, the variance submittals, and other information received, pursuant to a recent settlement agreement, there are special or unusual circumstances applying to the subject property which exist either to a degree which deprive the applicant or owner(s) 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 the subject property.

ALTERNATIVES

Alternatives available to the applicant include the following actions:

1. Improve and extend the existing public water system to allow the proposed 45-lot
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subdivision, pursuant to Chapter 23, Subdivisions.

2. Develop a private water supply and construct a private water distribution system within the subdivision meeting the requirements of the DWS and Chapter 23, Subdivision.
3. Obtain a variance for private individual rain catchment for the proposed lots. The Planning Director previously denied a requested the owner's previous variance request to allow rain catchment only.

INTENT AND PURPOSE

The intent and purpose of requiring a water system for and within a proposed subdivision is to assure that adequate water is available for human consumption and fire protection. It is the County's General Plan policies and standards that water system improvements and extensions shall promote the County's land use development pattern, that all additional or new water systems are built to DWS standards, and that fire emergency needs are coordinated to ensure there is adequate water are available in the event of an emergency.

In view of alternatives cited above ("2."), the request to develop a private water system is reasonable and superior to permitting a variance to allow private rain catchment systems only. This option and variance request to allow only private rain catchment systems was previously denied. Although the owner or developer will be allowed to designate the water system as non-potable, the individual lot owners can use the water for irrigation, non-potable domestic needs, fire protection-control, and, if they choose, for drinking. The private water system would not meet County dedicable standards primarily in that there would not be a backup source. The owner's engineer would certify that other deviations from County-DWS standards would be functionally equivalent.

PLANNING DIRECTOR'S DECISION AND OTHER REQUIREMENTS

In accordance with this settlement agreement, a variance from the Department of Water Supply (DWS) requirements for a private water system. As such, the amended variance request by the applicant, on behalf of the owners, is approved subject to the following conditions:

Owner shall construct a professionally engineered non-dedicable water system from his well, with service stubbed out to each lot in the project.

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The private water system shall be designated and engineered by a licensed professional engineer, to provide water at domestic volume and pressure to each lot, and the engineer shall determine that the requested alternatives to the DWS standards will provide functionally equivalent service.

1. Owner shall provide a minimum of 6000 gallons storage at all times to provide water for fire fighting. Access to the fire storage tank and the connector system shall meet with the approval of the Fire Department.
2. The system shall be supplied with the same quality of water as is produced from the well, but may be designated as "non potable", if requested by the owner.
3. The subdivision's private covenants, conditions, and restrictions (CC&Rs) shall require lot owner(s) to install a whole house (home) filtration system for water supplied from individual catchment water tanks and/or from owner's existing private water system. The deeds for all lots arising out of subdivision (SUB 01-0155) shall contain deed language or covenants in a form approved by corporation counsel acknowledging that the lots are served by a private water system, and that there are no conditions existing on the property which would justify a variance from the subdivision code to permit further subdivision.
4. Owner shall be permitted to construct the infrastructure and sell lots in the subdivision in phases. In that event, final subdivision approval shall be in phases.
5. Owner shall obtain and have ready for installation into the well a "back-up" water pump in the event of the failure of the primary pump.
6. The owner shall manage the private water system or shall form an association of lot owners to manage the system. The managing entity shall have the power to file and enforce liens against any lot owners who fail to pay any charges or assessments for the private water system.
7. The subdivider, owners, 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.

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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,

CHRISTOPHER J. YUEN
Planning Director

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xc: SUB 01-0155
DWS-Engineering Division
Planning Dept. – Kona
Brian De Lima, Esq.