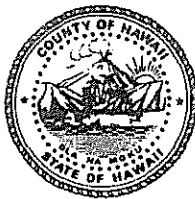


Harry Kim
Mayor



Christopher J. Yuen
Director

Brad Kurokawa, ASLA
LEED® AP
Deputy Director

County of Hawaii
PLANNING DEPARTMENT

101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720-3043
(808) 961-8288 • FAX (808) 961-8742

August 28, 2006

Mr. Roy A. Vitousek, III, Esq.
CADES SCHUTTE, LLP
75-170 Hualalai Road, Suite 303
Kailua-Kona, HI 96740

Dear Mr. Vitousek:

SUBJECT: VARIANCE-VAR 06-051

Applicant: ROY A. VITOUSEK, III, for Cades Schutte, LLP
Owner: ROY A. VITOUSEK, III, for McCANDLESS RANCH
Request: Variance from Chapter 23, Subdivisions
Tax Map Key: 9-2-001:003, (SUB 06-000402)

After reviewing your variance application, the Planning Director certifies the approval variance-VAR 06-051 subject to variance conditions. The variance to allow proposed 6-lot subdivision of the above referenced TMK property without providing water supply system and constructing additional roadway improvements. The variance request is from Hawaii County Code, Chapter 23, Subdivisions, Division 2, Improvements Required, Section 23-84, Water Supply, (1)(2); and, roadway requirements required by the Department of Public Works (DPW) for the proposed subdivision or Chapter 23, Subdivisions, Article 6, Improvements, Division 2, Improvements Required, Section 23-88, Requirements for non-dedicable street; private dead-end.

BACKGROUND

1. **Location.** The subject TMK property, containing approximately 6868 + acres, is "mauka" of Mamalahoa Highway or South Kona Belt Road and located at between 6000 feet to 7000 feet elevation on the southwestern flank of Mauna Loa. The property is situated at Kahuku and Honokua, Kau, Hawaii.

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2. **Zoning.** The subject property is zoned Agricultural (A-20a) by the County and designated Agriculture "A" by the State Land Use Commission (LUC). The property is not within the Special Management Area (SMA).
3. **Subdivision Request/PPM.** The owner's submitted proposed subdivision application (SUB 06-000402). The pending 6-lot subdivision application and the application's preliminary plat map (PPM) dated February 18, 2006 was acknowledge by letter dated August 15, 2006; and, further action on the proposed subdivision is being deferred on the subdivision pursuant to letter dated August 15, 2006.
4. **Variance Application.** The subject variance application including attached maps and submittals-exhibits, etc. was acknowledged by Planning Department letter dated July 12, 2006. The variance application's background reports, respectively, states in part:

Water Supply:

"The Applicant has no plans for installing a private water system at this time, and the Property is not served by County water. However, pursuant to Rule 22-6 of the Hawaii County Planning Department Rules of Practice and Procedure, the requested variance would enable the applicant to apply to subdivide the Property into lots that are far more than twenty acres in size, and that are approximately fifty times the minimum lot size allowed by A 20a zoning.

The proposed large-lot subdivision is part of and consistent with the terms of a pending agreement between the landowner and the United States Forest Service with respect to the, sale, by McCandless Ranch, of a conservation easement over all or portions of the 6969+ acre property. At present the two, 250 acre lots are being reserved out of the conservation easement. The four larger lots may be subject to the easement (the actual area will be determined by the appraisal, among other factors). The easement does not allow regular residential use of the area. The fee owner is enabled to develop only limited improvements to further the conservation and reserved ranch recreational purposes. It is the intent of the conservation easement to protect the conservation values of Kahuku in perpetuity.

A copy of the current draft of the conservation easement is attached hereto as **Exhibit B.**

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It appears that this area receives 40-60 inches of rain per year. There is less rain but more fog in the mauka portion of the property. The amount of rainfall will be more than adequate for the permitted uses under the proposed conservation easement and under County requirements for agriculturally zoned properties.

The Applicant wants to create separate parcels even though the whole are (except the 250 excluded parcels) may be burdened by the conservation easement to allow more flexibility in estate planning and financial planning.

The Applicant believes the request for a variance meets the requirements of Rule 22-6 as the 6 lots represent a substantial reduction of permitted density and because of the limitations on residential use. There will be fire contingency plans built into the conservation easement and management plan; there will be little risk to persons or property; and there are no public health or safety considerations which would be adversely affected by the granting of the requested variance or the subdivision of the property."

Roadways:

The access to the Property is currently over an unpaved gravel road from Mamalahoa Highway to the subject property. The roadway is approximately 12 feet wide and is regularly maintained by a bulldozer operated by a ranch employee.

The road from Mamalahoa Highway to the subject property and the roadways on the subject property are passable using a high clearance two wheel drive vehicle.

The Kahuku are of McCandless Ranch, the 6969+ acre parcel identified as TMK (3)9-2-01:3 (see attached TMK map, **Exhibit A**, is the subject of an agreement between McCandless Ranch and the United States Forest Service ("USFS"). McCandless has agreed to sell a conservation easement over this area to the USFS or a comparable entity. A form of the conservation easement has been prepared. An appraisal is currently being undertaken to determine the value of the proposed conservation easement. Once the appraisal is complete the specific terms of the purchase and sale agreement will be finalized. A copy of the current draft of the conservation easement is attached hereto as **Exhibit B**.

The terms of the conservation easement strictly limit the uses on the property and call for the access road to remain unpaved. The two proposed 250-acre parcels would not be subject to the easement. The lands subject to the easement can be used only for purposes which further the conservation and retained ranch and recreational purposes. There are strict limitations on the type and size of permitted structures. No permanent or regular residences will be permitted in the easement area.

There are no health or safety issues or concerns implicated by the request for a road variance. The ranch roads are completely sufficient and appropriate for access to these very large parcels with strictly limited conservation-oriented uses.”

5. **Agency Comments and Requirements: VAR 06-051:**

- a. The State Department of Health (DOH) memorandum is dated July 25, 2006 (Refer to memorandum in file).
- b. The Department of Water Supply (DWS) memorandum dated August 8, 2006 states in part:

“We have reviewed the subject variance application and our comments are as follows.

Please be informed that the subject parcel is not within the service limits of the Department’s existing water system facilities. The nearest Department of Water Supply facility is an existing 8-inch waterline within the Mamalahoa Highway, approximately 1.7 miles from the access to the property.”

6. **Notice to Surrounding Owners/Posted Sign.** The applicant’s agent submitted affidavits regarding a notice mailed to property owners to list of surrounding property owners and photograph of a sign posted on subject property. According to the agent’s affidavits and submittals, it appears that a notice was mailed on or about July 28, 2006; and, the required sign was posted on subject property on or about August 1, 2006. **Note:** According to the applicant’s designee, the original sign or information on the sign was modified or changed to include information required by variance acknowledgment letter dated July 12, 2006.

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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.

ALTERNATIVES/SPECIAL AND UNUSUAL CIRCUMSTANCES

Water Supply. The first alternative requires the applicant or owners to extend and/or improve the existing county water system and provide the necessary 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.

Given the intent and purpose of the subdivision, the imposition of extending or improving the existing public DWS water system or providing an approved alternative private water system meeting DWS standards for the pending subdivision would be putting excessive demands upon the applicant or owners.

Lot Access/Roadways. The first alternative requires the subdividers to construct roadway according to Standard Detail R-39 within the existing pole and existing property and South Kona Belt Road; and proposed roadway improvements within numerous "25-Ft Wide" and "50-Ft Wide" "Access Easements" denoted on the subdivision application's preliminary plat map in accordance with DPW comments or Chapter 23, Subdivisions.

Given the intent and purpose of the subdivision, the imposition of requiring road improvements within pole and privately owned access easements and/or conservation easements to access the proposed subdivision are not required or necessary.

INTENT AND PURPOSE OF THE SUBDIVISION CODE

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.

The State Department of Health has no specific rules or regulations relating to the utilization, construction or inspection of private roof catchment water systems for potable or emergency uses.

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The analysis of the applicant's submittals compared with recent rainfall data and historical rainfall data for the surrounding areas indicate the proposed subdivision will receive approximately 40 inches +/- of rainfall yearly.

Given the unusual nature of the subdivision and annual rainfall within the immediate area, the intent of the proposed subdivision the variance request is reasonable. The provisions for water storage, water distribution, and construction of any necessary private rain water catchment system(s) will be addressed by the applicant or future lot owner(s).

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.

The proposed subdivision and adjoining areas are agricultural or pastoral in character. The status of property access and status of ownership of the privately owned and/or publicly owned network of rights-of-way within this district was created before statehood and prior to adoption of the 1967 Zoning and Subdivision Codes by the County of Hawaii. The subject TMK property can access the Hawaii Belt Road via a utility and access easement on the adjoining property(s). Road maintenance for the roadway within the existing privately owned access and other easement(s) will be continued to be privately addressed and shared among the current owners and users.

Therefore, based on the representations made by the applicant's agent and evaluation of existing easement to the subject TMK property and other access to the subject TMK property or proposed subdivision, the Planning Director has concluded that the DPW comments to install agricultural pavement conforming to Standard Detail R-39 within the privately owned access and utility easement is not required to permit the proposed 6-lot subdivision; and, physical lot access within the subdivision or physical access between both proposed lots to the Hawaii Belt Road will be addressed privately by the subdividers or users.

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.

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DETERMINATION-VARIANCE CONDITIONS

The variance requested to allow a proposed 6-lot subdivision of the subject TMK property without providing a water system meeting DWS standards and utilize existing road access and/or other easements, 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. 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 06-000402. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions affecting only the two (2) proposed 250 acre lots created by SUB 06-000402 not covered by the proposed conservation easement and not serviced by a County water system and shall be duly recorded at the Bureau of Conveyances of the State of Hawaii 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 06-000402. 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 lots created by SUB 06-000402 not serviced by a County water system. No further subdivision of the lots created by SUB 06-000402 will be permitted unless county water system requirements and other requirements of Chapter 23, Subdivisions, are met.
 - c. Any lots created by SUB 06-000402 may not be made subject to a condominium property regime.

- d. Any farm dwelling constructed on the two (2) proposed 250 acre lots 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. Any permitted farm dwelling shall be provided with and maintain a private water supply system which includes an additional minimum 3,000 gallon water storage capacity for fire fighting 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 Hawaii County Fire Department. The Hawaii 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 fire fighting 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 06-000402 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 06-000402, the owner(s) of the lot(s) created by SUB 06-000402 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.

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- h. The subdivider and all grantees, successors, and assigns acknowledge that the parcel was created by a variance from the normal subdivision requirements of Hawaii 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. ROAD VARIANCE. The subdivider, owners, their assigns, or successors understand that the lots arising out of SUB 06-000402 will use and maintain the privately owned road and utility easement on their own without any expectation of governmental assistance to maintain the existing access or roadway improvements or any privately owned access or utility identified on the subdivisions preliminary plat map or any other necessary access and utility easement(s) within the proposed subdivision.

The applicant, 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 06-000402. The proposed lots shall form an 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 Hawaii by the Planning Department at the cost and expense of the applicant:

- a. The applicant and/ or owner(s) shall indemnify and defend the State of Hawaii or County of Hawaii from any and all liability arising out of vehicular access to and from the subject property utilizing this existing private utility and access easement.

Upon written demand of the County of Hawaii, 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 06-000402 or/and any access or utility easement servicing the lots created by SUB 06-000402. Should the improvement district require acquisition of any privately owned rights-of-way fronting the lots arising out of SUB 06-000402, 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 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 future lot owner(s) agree to participate in any road maintenance agreement or/and pay their fair share to maintain the access and/or utility easement identified on the subdivision's final plat map.

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.

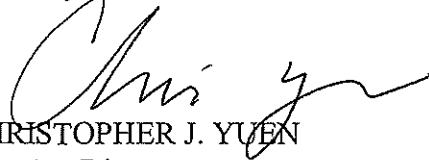
4. The subdivision application's (SUB 06-000402) final plat map shall meet all the requirements of the Hawaii County Zoning Code and the Subdivision Code not covered by this variance. No other variances from Chapter 23, Subdivisions, shall be granted to permit subdivision application SUB 06-000402.
5. 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.

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

Thank you for your understanding and patience during our review.

Sincerely,



CHRISTOPHER J. YUEN
Planning Director

WRY/DSA:cd
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xc: DPW-Engineering Branch
DWS-Engineering Branch
SUB 06-000402