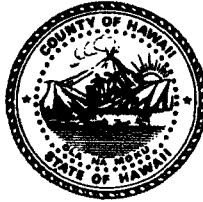


William P. Kenoi  
Mayor



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

June 12, 2009

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

Dear Mr. Vitousek:

**SUBJECT: VARIANCE-VAR 08-047**

**Applicant: ROY A. VITOUSEK III-CADES SCHUTTE LLP**

**Owner: McCANDLESS LAND & CATTLE COMPANY**

**Request: Variance from Chapter 23, Subdivisions,  
Improvements (Water Supply) Required**

**Tax Map Key: 8-6-001:001; 8-6-006:004 and 038; 8-6-007:025, 029, 030, 036,  
042, 043, 044, 045, and 046, (SUB 08-000742)**

After reviewing your variance application, the Planning Director certifies the approval of VARIANCE-VAR 08-047 subject to variance conditions. The variance permits proposed consolidation/resubdivision (SUB 08-000742) to be created without providing a water system meeting the minimum requirements of the Department of Water Supply (DWS). The variance is from Hawaii 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 TMK properties, consisting of approximately 6088.791 acres, are mauka of Mamalahoa Highway, between markers 99 and 100, and situated at Honokua, South Kona, Hawaii. The property(s) or proposed subdivision can be identified by posted sign(s) upon property "mauka side" of Mamalahoa Highway between markers 99 and 100.

**JUN 16 2009**

TAX MAP KEY: 8-6-001:001 (remainder); 8-6-006:004 and 038; 8-6-007:025,029,030, 036, 042, 043, 044, 045, and 046

2. **Zoning.** The subject property is zoned Agricultural (A-5a) by the County and designated Agriculture "A" by the State Land Use Commission (LUC).
3. **Subdivision Request/PPM.** The owner or subdivider filed a subdivision application (SUB 08-000742) and revised preliminary plat maps (PPM) proposing to consolidated and resubdivide subject TMK property(s) into building, conservation, and roadway lots. Further action on the proposed subdivision is being deferred according to May 13, 2008 letter in the subdivision file (SUB 08-000742).
4. **Variance Application(s).** The applicant, on behalf of the owner or subdivider, file variance applications and submittals from water supply (VAR 08-047) and roadway (VAR 08-048), respectively, on July 23, 2008. The applicant's variance from water supply includes background information and following statements (pages 4-5):

"The Property is zoned Ag-5a (agricultural use with a minimum lot size of 5 acres). The proposed subdivision is consistent with zoning for the Property. The proposed subdivision is consistent with Planning Department Rule 22 pertaining to water variances for water catchment use.

The proposed lots of 20+ acres exceed the minimum lot size for the Ag-5 zoning by more than four times and therefore meet requirements for a Large Lot Subdivision under Planning Department Rule 22-6. The project is consistent with the intent and purpose of the Zoning and Subdivision Codes."

In sum, the owner-McCandless Land and Cattle Company, LLC or subdivider, wishes to consolidate 12 pre-existing lots situated within approximately 6,089-acre project site and subdivide the property into the following lots identified on current or revised PPM dated October 24, 2008:

1. 7 "CONSERVATION LOTS" ranging in size from approximately 434.569 acres to 1,343.626 acres;
2. 4 agricultural lots ranging in size from between minimum 20+ acres to 24.8 acres;

3. The last remaining pre-existing lot will be further subdivided into 19 agricultural lots with areas in excess of 20 + acres. The variance from water supply, as approved, applies only to these 19 lots that are being subdivided beyond the original 12 pre-existing lots. Lots affected by this variance, as shown on the preliminary subdivision plat map dated October 24, 2008, consists of Lots 12 through 18, 20 through 24 and Lots 27 through 33; and,

4. Proposed privately owned 50 feet wide roadway lot(s).

5. **Variance Application (VAR 08-047)-Agency Comments and Requirements:**

- a. The State of Hawaii-Department of Health (DOH) memorandum is dated September 2, 2008. Refer to DOH memorandum in variance file.
- b. The County of Hawaii-Hawaii Fire Department (HFD) memorandum is dated September 5, 2008. Refer to HFD memorandum in variance file.
- c. The Department of Water Supply (DWS) memorandum, dated May 21, 2008, in subdivision file (SUB 08-000742) to the PPM states in part:

“Please be informed that there is no public water system in the area”

Note: According to the applicant background information: The closest County water system “ends at Hookena, approximately 2 miles north of the subject property”.

6. **Notice to Surrounding Owners.** The applicant’s submitted an affidavit dated September 2, 2008 and copy of notice sent or mailed to list of surrounding property owner(s) within 300 feet of subject TMK property(s). Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on August 31, 2008.

**Posted Sign.** The applicant submitted an affidavit dated August 5, 2008 regarding sign posted on subject TMK property or “on the mauka side of the road between mile marker 99 and 100 at Honokua ahupua’a” and photograph or picture of the posted sign.

7. **Comments from Surrounding Property Owners or Public.** No other agency comments were received and no objections were received from surrounding property owners or public.

Therefore, after considering the applicant's variance application from water supply, background information regarding status of pre-existing lots, agency comments regarding the variance application, and other comments received regarding the proposed subdivision, the Planning Director has determined that there are special or unusual circumstances applying to subject TMK property(s) or "Property" or proposed subdivision action which exist either to a degree which deprives the owner of the 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(s) or proposed subdivision.

#### **ALTERNATIVES**

The DWS memorandum dated May 21, 2008 in subdivision file (SUB 08-000742) states in part the following:

"We have reviewed the subject application. Please be informed there is no public water system in the area."

The first alternative requires the owner or subdivider to construct a public water system or County DWS water system for the proposed subdivision.

The second alternative would be to design, drill and develop private wells and construct a privately owned water system improvements in accordance with DWS standards.

The applicant background information (Page 4) states in part:

"The cost of installing a private water system to serve the proposed lots created by subdivision would be prohibitively expensive. Existing County water ends at Ho'okena, approximately 2 miles north of the subject property. Without a water variance, the owner will be deprived of its rights to subdivide and sell the property as out (sic) above."

In view of the above, there are no other reasonable alternatives in resolving the difficulty of the applicant. The imposition of constructing a public water system or providing an approved alternative private water system meeting DWS standards for proposed consolidation/resubdivision (SUB 08-000747) would be putting excessive demands upon the applicant when a

Roy A. Vitousek, III, Esq.  
CADES SCHUTTE LLP  
Page 5  
June 12, 2009

more reasonable alternative is available.

### **INTENT AND PURPOSE-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.

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.

The alternative to a water system proposed by the applicant or variance from "Water Supply, pursuant to Planning Department rule 22-6, Exceptions for Large Lot Subdivisions" to permit privately owned individual rain water catchment systems for proposed building lots created by the proposed subdivision can meet the intent and purpose of the Subdivision Code; and, allowed pursuant 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 and, requires that a proposed subdivision requesting a variance to allow individual rainwater catchment systems for potable and emergency needs must receive a minimum 60 inches of annual rainfall for each lot served by catchment. However, Rule 22, states in part:

"22-6 Exceptions for Large Lot Subdivisions.

Exceptions to the minimum rainfall requirement and the maximum number of lots (up to absolute maximum of twenty lots) may be granted if the subdivision results in lots averaging maximum of twenty lots) may be granted if the subdivision results in lots averaging at least twenty acres in size **and** averaging at least four times the minimum lot size allowed by zoning."

In view of the original variance submittals and revised PPM the proposed consolidation/resubdivision can be permitted pursuant to Rule No. 22-Water Variance, 22-6, Exceptions for Large Lot Subdivisions, and subject to variance conditions.

The applicant's variance application was acknowledged by letter dated August 19, 2008. Additional time to review revised PPM and consider agency comments was necessary. The

applicant or owner granted the Planning Director an extension of time to render decision on Variance Application-VAR 08-047 to on or before June 14, 2009.

Based on the foregoing findings, this variance request or Variance Application-VAR 08-047 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 detrimental to the public's welfare and will not cause substantial adverse impact to the area's character and to adjoining properties.

#### **VARIANCE DECISION-CONDITIONS**

The variance request to allow proposed consolidation/resubdivision application (SUB 08-000742) of the subject TMK property(s) without providing a water system meeting DWS standards is **approved** pursuant to Rule 22, Water Variance, and subject to 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 owner, 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 08-000742. This written agreement shall contain the following deed language, being covenants, conditions, and restrictions for the affected lots created by subdivision application and covered by VAR 08-047 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 applicant or subdivider agrees and accepts the fact that a County dedicable public water system is not now able to service the proposed subdivision application SUB 08-000742. 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. No further subdivision of lots created by SUB 08-000742 will be permitted unless county water system requirements and other requirements

of Chapter 23, Subdivisions, are met.

- c. Any lots created by SUB 08-000742 may not be made subject to a condominium property regime.
- d. Any dwelling constructed on a 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 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 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 any lot created by SUB 08-000742 that the County Water System has been upgraded or an improvement district initiated to enable service to the lots created by SUB 08-000742, the owner(s) of the lot(s) created by SUB 08-000742 shall participate in such improvement district or shall pay their pro-rata share of

Roy A. Vitousek, III, Esq.  
CADES SCHUTTE LLP  
Page 8  
June 12, 2009

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 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. The subdivision application's final plat map shall meet all the requirements of the Hawaii County Zoning Code and the Subdivision Code not covered by this variance.
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 subject VARIANCE-VAR 08-047 null and void.

Sincerely,



BJ LEITHEAD TODD  
Planning Director

WRY/DSA:mad  
P:\WP60\WRY\FORMLETT\VAR08-047SUBWATERRULE22APP.CSLLP-MLCC

xc: Manager-DWS  
SUB 08-000742