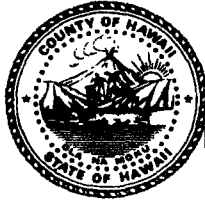


William P. Kenoi
Mayor



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 08-048

Applicant: ROY A. VITOUSEK III-CADES SCHUTTE LLP

Owner: McCANDLESS LAND & CATTLE COMPANY

**Request: Variance from Chapter 23, Subdivisions,
Improvements (Roadways) 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 08-048 subject to variance conditions. The variance permits allows proposed consolidation/subdivision (SUB 08-000742) or the above referenced TMK properties without providing or constructing road improvements meeting minimum requirements of Chapter 23, Subdivisions. The applicant requests variance from Hawaii County Code, Chapter 23, Subdivisions, Article 3, Design Standards, Division 4, Section 23-41, Minimum right-of-way and pavement widths, Section 23-48, Cul-de-sacs, Article 6, Improvements, Division 2, Section 23-87, Standard for nondedicable street; escrow fund, Section 89, Sidewalks, Section 23-91, Curbs and gutters, Section 23-93, Street lights, and Section 23-95, Right-of-way improvement.

The Planning Director has concluded that the variance to permit alternative or non-dedicable roadways for proposed subdivision 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

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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.

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, 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 roadways includes background information and following statements (page 6):

"The proposed roadway variance for design criteria set out in AASHTO Green Book for Very Low-Volume Local Roads will not be detrimental to public welfare or burden County resources. The proposed roadways are designed for very low volume."

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 08-048)-Agency Comments and Requirements:**
 - a. The State of Hawaii-Department of Health (DOH) memorandum dated September 2, 2008 states:

“The Health Department found no environmental health concerns with regulatory implications in the submittals.”
 - 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 Public Works-Engineering (DPW-Eng.) memorandum, dated September 11, 2009 states in part:

“We reviewed the subject application and our comments are as follows:

Required pavement and right-of-way/easement width should be specified in any roadway variance approval. The applicant requests a blanket variance from Section 23-87. We recommend the minimum pavement section be specified to conform to the minimum pavement section requirements of Section 23-7.

We concur that a road width of 18 feet with 2 foot shoulders meets with AASHTO minimum guidelines for very low volume roads (Average Daily Traffic less than 400 trips) for the culdesacs (sic) serving parcels shown in Exhibit 2.

We believe the applicant failed to request a variance from Section 23-95, as they do not intend to improve the entire 50-foot right-of-way. There may be a need for improvements outside of the pavement and shoulder to address roadside safety and drainage issues.

We have no objection to the requested variance provided the private road is designed by a licensed civil engineer, meeting with the AASHTO low-volume guidelines for an appropriate design speed, and as stated above. Development generated runoff shall be disposed of in a manner meeting with the approval of the DPW."

Note: Variance from "Section 23-95" was noted after the application was filed and cited in the public notice published on August 31, 2008; and included, as part of the applicant's request for variance from roadways.

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 the following letters were received from surrounding property owners or public:
 - 7a. Letter and comments dated September 16, 2008 including attachments from Clarence A Medeiros, Jr. and Nellie J. Medeiros.
 - 7b. Letter and comments dated September 19, 2008 from Roland K. Medeiros.
 - 7c. Letter and comments dated September 19, 2008 Comments from Malcolm K. Kahili requesting an extension (unspecified).

Therefore, after considering the applicant's variance application from roadways, background information regarding status of pre-existing lots, agency comments regarding the variance application, and other comments 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 DPW-Engineering memorandum dated November 24, 2008 in subdivision file (SUB 08-000742) for the subdivision application's preliminary plat map (PPM) was received after the variance application was submitted for review. This DPW memorandum requires the owner or subdivider to submit a drainage report and subdivision construction plans for agency approval to construct dedicable and non-dedicable streets or roadways, and necessary streetlights, signage, pavement markings, etc. within privately owned access easements and proposed privately owned road rights-of-ways identified on the PPM (Refer to copy of the DPW memorandum dated November 24, 2008 in the variance file).

The applicant's variance background information (Page 5) filed prior to November 24, 2008 states in part:

"The cost of installing roadways, street lights, sidewalks, and curbs and gutters to County standards for the proposed lots created by subdivision would be prohibitively expensive for this large agricultural subdivision. It is the owner's intent not urbanize this agriculturally zoned area but to keep it in character with the existing land uses of the area. The owner will be deprived of its rights to subdivide and sell the property as out above if required to construction improvements more in character with an urban subdivision."

The approval of this variance will allow for following deviations from the minimum roadway requirements of Chapter 23, the Subdivision Code, for proposed agricultural subdivision (SUB 08-000742):

1. Sections 23-87 & 23-41 - Construction of internal subdivision roadways to agricultural standards with a minimum pavement width of 18 feet with 2-foot wide paved shoulders within a 50-foot wide right-of-way, in lieu of a minimum 20-foot wide agricultural pavement with 10-foot wide shoulders/drainage swales within a 50-foot wide right-of-way. This alternative agricultural

roadway will be constructed to design criteria set out in the American Association of State Highway and Transportation Officials (AASHTO) Policy on Geometric Design of Highways and Streets, 2004, for Very Low-Volume Local Roads.

2. Section 23-48 - Cul-de-sacs maintaining a maximum distance of approximately 3,000 feet, exceeding a maximum length of 600 feet as allowed by the Subdivision Code. Even with the much greater length, each cul-de-sac will not service more than 11 lots.
3. Section 23-93 - Elimination of street lights along this agricultural roadway to maintain the rural agricultural character within this particular section of South Kona. However, necessary street name signs and traffic signs at intersections may be required and subject to agency review and approval.
4. Section 23-89 and 23-91 - The Subdivision Code does not require the installation of side walks, curbs, and gutters or pedestrian safety improvements along agricultural-standard roadways or "improve the entire street right-of-way" pursuant to Section 23-95, Right-of-way improvement. While a variance, therefore, is not technically required, it is being included to confirm that such improvements will not be necessary.

Access to proposed subdivision is via the Old Government Road (a "Road in Limbo" pursuant to November 24, 2008 DPW memorandum). The applicant is requesting a roadway variance to allow construction of non-dedicable privately owned infrastructure or roadway improvements located upon 150 feet wide easement(s) and upon proposed 50 feet wide privately owned road lot within pending subdivision. The owner or subdivider proposes to submit alternative subdivision construction plans to construct proposed non-dedicable privately owned roadways utilizing "design criteria set out in AASHTO Green Book for Very Low-Volume Local Roads". Access to the proposed subdivision from Old Government Road and upkeep and/or maintenance of the privately owned roadways upon 150 feet wide easement(s) and privately owned roadways upon 50 feet wide road lot(s) will be borne by the users pursuant to variance and variance conditions.

In view of the above, there are no other reasonable alternatives in resolving the difficulty of the applicant. The imposition of constructing minimum dedicable and minimum non-dedicable roadway improvements stipulated by DPW memorandum dated November 24, 2008 for proposed consolidation/ resubdivision (SUB 08-000747) or PPM would be putting excessive demands upon the applicant or subdivider when a more reasonable alternative for roadways for the large lot agricultural subdivision is available.

INTENT AND PURPOSE-ROADWAY VARIANCE

The proposed agricultural subdivision and surrounding areas are agricultural or rural in character. The Planning Director finds that the applicant or subdividers request to develop proposed large lot agricultural subdivision utilizing ASSHTO criteria for low volume roadways and construction of alternative non-dedicable roadways for proposed subdivision and appropriate access to "mauka" lots or conservation easements can meet the intent and purpose of Chapter 23, Subdivisions. To this end, the applicant or subdivider will submit a drainage report and submit alternative subdivision construction plans prepared by designed by a licensed civil engineer for review by the Planning Department and agencies for approval. Maintenance of the access to and/or non-dedicable roadway improvement s within the proposed subdivision will be privately addressed and paid for by the users.

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 Panning Director an extension of time to render decision on Variance Application-VAR 08-048 to on or before June 14, 2009.

Based on the foregoing findings, the request for variance to construct alternative non-dedicable roadways in lieu of the roadways required by the DPW memorandum 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 from roadway 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.

VARIANCE DECISION-CONDITIONS

The variance request to allow proposed consolidation/resubdivision application (SUB 08-000742) of the subject TMK property(s) and permit alternative non-dedicable roadways to be constructed for proposed 30-lot subdivision is **approved** 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. Submit alternative construction plans to construct non-dedicable privately owned roadways for proposed subdivision including any drainage report to DPW and agencies for review and approval.

3. ROAD VARIANCE. The subdivider, owners, their assigns, or successors understand that the lots arising out of SUB 08-000742 will use and maintain the privately owned road and any utility easement on their own without any expectation of governmental assistance to maintain the existing access or roadway improvements within the privately owned roadway lots and/or utility easement identified on the subdivision's revised 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 08-000742. 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 affected lots covered by VAR 08-048 and created by the approval of subdivision application (SUB 08-000742) 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 and privately owned roadway upon private easement(s) and privately owned road lot(s).

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 08-000742.

Should the improvement district require acquisition of any privately owned rights-of-way fronting the lots arising out of SUB 08-000742, 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 privately owned roadway lots and/or utility easements.

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 08-000742) 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 08-000742.
5. 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.
6. 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 08-048 null and void.

Sincerely,



BJ LEITHEAD TODD
Planning Director

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

xc: DPW-Engineering Division
SUB 08-000742
Clarence A Medeiros, Jr. and Nellie J. Medeiros
Roland K. Medeiros
Malcolm K. Kahili