

William P. Kenoi
Mayor



BJ Leithead Todd
Director

Margaret K. Masunaga
Deputy

County of Hawaii

PLANNING DEPARTMENT

Aupuni Center • 101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720
Phone (808) 961-8288 • Fax (808) 961-8742

August 19, 2009

Mr. Roy A. Vitousek III
Cades Schutte, LLLP
75-170 Hualālai Road, Suite 303
Kailua-Kona, HI 96740

Dear Mr. Vitousek:

**Subject: Special Management Area (SMA) Use Permit Assessment
Application (SAA 09-000474)**
Applicant: Keith and Cynda Unger
Owner(s): McCandles Land & Cattle Company, LLC
Request: Construction of a Single-Family Dwelling and Access Driveway
TMK: 8-6-014:012 and 8-6-011:003, Por. Kealia 2nd to Kalahiki, South Kona, Hawai'i

This is to acknowledge receipt on July 17, 2009 of your re-submittal of the application for the construction of a single-family dwelling and access driveway on the subject parcels.

Parcel 8-6-014:012 is 0.2 acres and parcel 8-6-011:003 is 156.192 acres. Parcel 8-6-014:012 is designated Conservation and parcel 8-6-011:003 is designated Conservation and Agriculture by the State Land Use Commission. All proposed activity is to occur in the Conservation District of the parcel. Due to the Conservation District designation, the County of Hawai'i zoning of Open and Agriculture (A-5a) do not apply. The County of Hawai'i Land Use Pattern Allocation Guide designates parcel 8-6-014:012 as Open the other as both Open and Extensive Agriculture. Parcel 8-6-014:012 is located entirely within the Special Management Area (SMA), the other parcel is partially in the SMA.

Our previous review of the first submittal identified a number of issues that needed to be addressed before we are able to process your application. They are listed for you again here:

1. All landowners of both parcels involved in the proposed action must sign the application form or provide letters of approval for the proposed project.

- According to Real Property Tax records there are multiple entities who share ownership of parcel 8-6-014:012 with McCandles Land and Cattle Company, thus title documentation will also need to be provided identifying all owners of this parcel. Parcel 8-6-011:003 is jointly owned by Noenoe Marks Lindsey, McCandles Land and Cattle Company, and Elizabeth Marks Stack.
2. The application provides an archaeological survey of parcel 8-6-014:012 and notes the remains of several historic sites on the parcel, however no comments from State of Hawai'i Department of Land and Natural Resources (DLNR) Historic Preservation Division (SHPD) were submitted as part of the application. The comments are essential in our review of the application to ensure the appropriate preservation and mitigation measures are employed. The proposed driveway alignment was noted as not having any historic features in the application, though no mention was made of areas surrounding the proposed driveway which may be impacted by construction activities, or whether the driveway was impacted by any buffer requirements from nearby historic sites. Also, there was brief mention of the historic King's Trail as being makai of the project site and that the trail was not identifiable. The trail alignment is part of the work that should be identified and approved of during the archaeological review, once again so that we can ensure the historic trail is not being disturbed and that appropriate buffers from the trail are being implemented to protect it from the proposed construction activities. Confirmation of the location of the historic trail and all applicable buffers must be confirmed in writing by DLNR Na Ala Hele Program (NAH).
 3. There are two potential zoning code and/or SMA violations on parcel 8-6-011:003, including the alleged bulldozing and destruction of part of the King's Trail and the construction of an unpermitted dwelling. Both of these violations will need to be rectified prior to the Department granting approval for other activities on the parcels.
 4. The proposed driveway over parcel 8-6-011:003 cannot be considered accessory to the proposed single-family dwelling as it is located on a separate parcel. Therefore, the cost of the proposed driveway must be provided so a determination can be made as to whether it would require a SMA Major Use Permit or a SMA Minor Permit.

Your re-submittal has adequately addressed the first point, relating to ownership of the subject parcels. We appreciate you providing us the documentation clarifying ownership of the subject parcels.

In your letter of July 15, 2009 which accompanied the re-submittal of the SMA Assessment Application, you state that according to Planning Commission Rules of Practice and Procedure (PC Rules) 9-10 that there is not a requirement for the applicant

to obtain and submit SHPD comments as part of the SMA Assessment Application and as such, you believe the application to be complete. However, you neglected to note that according to PC Rules section 9-10H, the Director must consider any possible "substantial adverse effect" to the SMA based on the criteria outlined. This criterion includes, "when the proposed use, activity, or operation: 1. Involves an irrevocable commitment to loss or destruction of any natural or cultural resource, including but not limited to, historic sites..." Given that SHPD has the statewide authority over all historic sites, and that the archaeological report in your draft EA highlights numerous archaeological sites on parcel 8-6-014:012 and near the proposed building site on parcel 8-6-011:003, we find that the proposed use, activity, or operation associated with the construction of a single-family dwelling may have an irrevocable loss of or destruction to historic sites, and that SHPD is the most qualified entity to make that determination. As such, we are holding to our requirement that SHPD comments be submitted to us so that we may consider those in our review of the application. We are also holding to our requirement that comments from NAH be submitted with the application since your archaeological survey notes that part of the "Old Road" crosses into parcel 8-6-014:012. If the Old Road is part of an historic trail then measures meeting with the approval of NAH will need to be accounted for in any proposal.

Your July 15, 2009 letter goes on to express concern over our desire to fully research and understand all issues related to a complaint we received in 2008 regarding bulldozing of an historic trail on parcel 8-6-011:003. We apologize that we did not have full information regarding the complaint at the time you first submitted your application. The application submittal increased the urgency of researching the complaint as it is not our practice to issue permits for parcels with outstanding, or pending, violations or allegations. Through cooperation with you and the landowner, we have been able to clarify some of the concerns and are close to concluding the investigation. If any violations are identified, their resolution or corrective actions will not delay the processing of the SMA Assessment Application.

Finally, you disagree with us on whether the driveway can be considered an accessory to the dwelling since it is on a different parcel. You cite PC Rule 9-4(21) which defines "Single-Family Residence" as "...any such uses or structures are situated on the same lot or building site..." However, if you research further, you will find the Hawai'i County Zoning Code Chapter 25-1-5(b) states "'Building site' means a parcel of land which is occupied or is to be occupied by a principal use and accessory uses or a building or group of buildings, and includes a lot and a plot," emphasis added. Since the definition clearly does not say that the building site can encompass multiple parcels, only a parcel, we interpret this to mean the accessory structures can only be on the parcel with the permitted use or structure.

Having made this clarification, we find this is a pointless discussion since we will likely not oppose the driveway so long as its construction does not impact historic sites. We received confirmation from you on August 19, 2009 that the estimated cost of creating the driveway on parcel 8-6-011:003 is approximately \$1,200. This information allows us to determine whether the construction will require a SMA Minor Permit or a SMA Major Use Permit. Once we receive the comments from SHPD regarding the alignment of the driveway in terms of possible impacts to historic sites or buffers to historic sites, we will make a final determination on the permitting requirements for the driveway. Your contention that your client has a legal right to enter the kuleana from the Old Road makai (seaward) of the parcel would require that you obtain permission from DLNR Office of Conservation and Coastal Land since the road is makai of the certified shoreline, and from SHPD and NAH since the road is potentially a historic trail and any use of the trail by vehicles or as a driveway would need to be approved by them. Only after we received comments from these three agencies would we review the proposed use of this road as your driveway for SMA purposes.

As a result of the above, the re-submitted application is being returned to you as incomplete. We emphasize again, when you resubmit the application, the following points must be addressed or it will be returned to you again as incomplete.

1. Submit comments from SHPD and NAH regarding preservation or buffer requirements for any historic sites, including historic trails, that may potentially be impacted by the proposed activities;
2. Given that the certified shoreline survey expired on June 19, 2009, our previous letter to you, dated July 8, 2009, allowed a three (3) month extension for the re-submittal of the application without having to recertify the shoreline. We will continue to honor this time extension; you have until October 8, 2009 to submit a complete SMA Assessment Application.

Finally, we would also like to again express our general concern with the suitability of this location for a single-family dwelling. The site is in close proximity to various hazards including flood zones and tsunami inundation zones. While the applicant feels confident that these hazards will not affect them, the reality is that the proximity of the shoreline to the building site, and the propensity for hazards in this area, mean the likelihood of being impacted by one of these hazards during the expected 50 year life of the dwelling is high. This ultimately puts first responders in hazards way unnecessarily. The re-submittal of the application will need to discuss this potential impact of natural hazards in further detail.

Mr. Roy A. Vitousek
Cades Schutte, LLLP
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Should you have questions, please feel free to contact Dana Okano of this office at 961-8288.

Sincerely,



BJ LEITHEAD TODD
Planning Director

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Enclosure: Original SMA Assessment Application

xc ltr only: Long Range Planning
Planning Department, Kona
Mr. Randy Lovato, Kona Planning

Department of Land and Natural Resources
Office of Conservation and Coastal Lands
PO Box 621
Honolulu, HI 96809

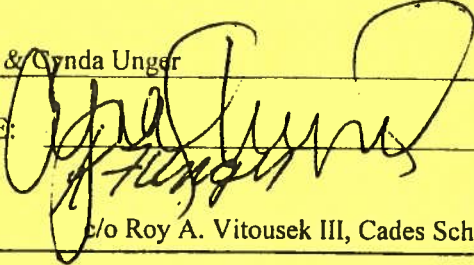
Department of Land and Natural Resources
State Historic Preservation Division
40 Po'okela Street
Hilo, HI 96720

Department of Land and Natural Resources
Na Ala Hele Program
19 E. Kawili Street
Hilo, HI 96720

SPECIAL MANAGEMENT AREA USE PERMIT ASSESSMENT APPLICATION
COUNTY OF HAWAII
PLANNING DEPARTMENT

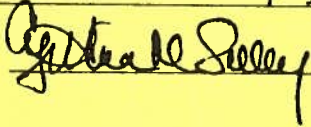
2009 JUN -4 PM 3:10

PLANNING DEPARTMENT
COUNTY OF HAWAII

APPLICANT(S): Keith & Cynda Unger
APPLICANT(S) SIGNATURE:  DATE: 6/1/09
APPLICANT'S ADDRESS: c/o Roy A. Vitousek III, Cades Schutte LLP
75-170 Hualalai Rd., Ste. B-303, Kailua-Kona, HI 96740

TELEPHONE - Business: 808-329-5811 Residence: _____

LANDOWNER(S): McCandless Land & Cattle Company, LLC (Cynthia M. Salley, its Manager)

LANDOWNER(S) SIGNATURE:  DATE: 6/1/09

LANDOWNER(S) ADDRESS: c/o Roy A. Vitousek III, Cades Schutte LLP
75-170 Hualalai Rd., Ste. B-303, Kailua-Kona, HI 96740

TAX MAP KEY(S): 8-6-014: 012 and 8-6-011: 003

NATURE OF DEVELOPMENT/ACTIVITY: Construction of Single Family Residence on TMK
8-6-014: 012 and grade access driveway across TMK 8-6-011: 003

TOTAL COST/FAIR MARKET VALUE: \$| \$250,000.00

DATE OF APPLICATION: June 1, 2009