

09-474

July 15, 2009

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2009 JUL 17 PM 3:55
 PLANNING DEPARTMENT
 COUNTY OF HAWAII

Re: SMA Use Permit Assessment Application (SAA 09-000464)
 for Construction of Single-Family Residence and Driveway
 Applicant: Keith and Cynda Unger
 Owners: McCandless Land & Cattle Company, LLC
 TMK Nos.: 8-6-014: 012 and 8-6-011: 003

Dear Ms. Leithead Todd:

This is a response to your letter of July 8, 2009. We are returning the Special Management Area ("SMA") Use Permit Assessment Application ("SMAA") which was received by the Planning Department on June 4, 2009 (SAA 09-000464). Contrary to your statements in the letter of July 8, 2009, we believe that the Application was and is complete.

First, all owners of TMK Nos. (3) 8-6-014: 012 and 8-6-001: 003 (the subject parcels) have signed the Application. Both parcels are owned exclusively by McCandless Land & Cattle Company, LLC (also known as McCandless Ranch). By Partition Deed dated February 28, 2000, recorded with the Bureau of Conveyances as Document No. 2000-026329, the other individuals who previously held interests in various McCandless Ranch properties deeded their interests in subject parcels to McCandless Land and Cattle Company. Attached hereto are relevant portions of the Partition Deed.

Second, there is no requirement in the County of Hawaii Planning Commission ("HCPC") rules that requires an applicant to obtain and submit State Historic Preservation Division ("SHPD") comments as part of an SMA Assessment Application. See HCPC Rule 9-10. The proposed single family home/kuleana use is subject to requirements for a Conservation District Use Permit ("CDUP") and an Environmental Assessment ("EA"). The EA was provided as part of the Application in SAA 09-000464. SHPD has had and will have multiple opportunities to comment on the proposed kuleana use. The Planning Department has provided SHPD with a copy of its letter to this office dated July 8, 2009, and could just have easily asked

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SHPD to comment on the Archaeological Assessment that is part of the EA. Again, the SMAA application was completed and complied with HCPC Rule 9-10.

Third, there are no zoning violations. The alleged “unpermitted dwelling” is located on TMK 8-6-014: 007, not the subject parcels. That parcel does not belong to Applicants or any member, owner, or benefiting party related to McCandless Land & Cattle Company.

The allegation relative to “alleged bulldozing and destruction of part of the King’s Trail” lacks content. Unless and until some official from a relevant regulatory agency can state what alleged violation occurred and where, there is no basis to use this vague allegation as a basis to stop processing the assessment. If the Department is alleging that a violation occurred, please be specific so the Applicants and Owner can address the allegation. If the Department is not alleging that a violation occurred, please process this assessment.

The statement in the letter that, “Both of these violations will need to be rectified prior to the Department granting approval for other activities on the parcels” is troublesome. It states what appears to be a conclusion by the Department that there are violations without the Department providing any due process as required by the Rules.

Further, the structure on TMK 8-6-014: 007 has been there for more than 10 years, apparently without any regulatory agency taking any action. Instead, the Department appears to be demanding that the Applicants cure a “violation” they had nothing to do with and which is on someone else’s property as a condition to seeking appropriate permits to develop an authorized kuleana use on a wholly different property. This is an unacceptable position.

Fourth, we disagree with the conclusion that the driveway cannot be considered accessory to a single family kuleana use because it is on a different parcel. HCPC Rule 9-4(21) says that “Single-Family Residence” . . . include[s] uses or structures normally considered accessory to the single family facilities provided that any such uses or structures are situated on the same lot or building site . . .” The driveway to the home is part of the same building site as the home and is accessory to a permitted, exempt use.

Further, the development of the driveway is not essential to the SMAA for the single family residence/kuleana use. The Applicants had proposed building a driveway to reduce the potential impacts on the coastal lands from using the existing roadway since the existing “Old Road” runs along the coastline. No SMA permit would be required for the Applicants to use the existing road. Not only is it an existing road, but kuleana owners have a legal right to use roadways on the ahupua`a (see HRS § 7-1) and a legal right of access to a public highway. While the Applicants would prefer to use the proposed driveway, the SMAA is complete and should be processed. To the extent the Department believes the home and the driveway are to be built separately, the Department can proceed with the SMAA as it relates to the home.

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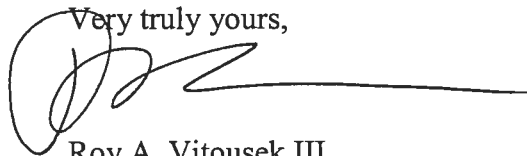
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It seems unfortunate that the Planning Department planner who apparently wrote the letter, Dana Okano, was not able to attend either of the site visits scheduled with the Applicants. Mr. Unger advises me that Ms. Okano scheduled site visits on two separate days then cancelled both of them at the last minute. Mr. Unger twice juggled his schedule to accommodate the site visit request and would have personally accompanied Ms. Okano on the site visit and been able to answer any questions. It is also unfortunate that the Department did not call me with questions or send me a letter asking for a response to their questions on these issues rather than reject the assessment application as "incomplete" without an effort to verify the accuracy of the reasons stated therein.

Applicant notes that the assessment was received by the Department on June 5, 2009. Because there was no basis for finding the application incomplete, it is being returned to the Department for processing.

As always, please call me if you have questions or wish to discuss this matter further.

Very truly yours,



Roy A. Vitousek III

for

CADES SCHUTTE

A Limited Liability Law Partnership

RAV:bah

encl. : Partition Deed dated 2/28/00 (por.)

cc: Dana Okano, Hilo Planning
Randy Lovato, Kona Planning
Department of Land and Natural Resources:
Office of Conservation and Coastal Lands
State Historic Preservation Division
Na Ala Hele Program
McCandless Land & Cattle Company, LLC