SAA-09-490

September 17, 2009

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BJ Leithead Todd, Planning Director
County of Hawaii
101 Pauahi Street, Suite 3
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Re: SMA Use Permit Assessment Application (SAA 09-000474)
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 August 19, 2009. The Planning Department has again returned SMAA 09-000474 based on a finding that the application is "incomplete" because it did not include comments from SHPD.

As stated in our letter of July 17, 2009, Rule 9-10 of the Planning Commission Rules states the requirements for an SMA assessment. The rule does not require inclusion of comments from SHPD or any other agency. The application, as submitted on June 2, 2009, and on July 17, 2009, is complete.

If the Planning Department believes comments from another agency are appropriate, it can solicit those comments from the relevant agency. If the Department cannot accomplish this in 35 days (see Rule 9-10(D)), then the Department can seek an agreement from the applicant to extend the time. If the Department is seeking an agreement to extend, hopefully it could show what efforts were made by the Department to get whatever information the Department needed in a timely manner. This is what the Department expects of applicants who request extensions from the Department.

However, to simply "find" that an application is incomplete because it does not include something that is not required and thereby avoid the requirements of Rule 9-10(D) is unreasonable. We are, therefore, again returning the SMAA for the Department's consideration. We regard the date of submission of a completed application to be July 8, 2009.

We will not, at this time, debate further the issue of whether the driveway to the single-family home is an accessory use to the single-family home because of the Department's apparent willingness to permit the driveway.

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However, there is no reason for any issue relative to the proposed driveway or TMK 8-6-011: 003 to delay the Department in finding that the proposed single family residence on the kuleana (TMK 8-6-14: 012) is exempt from the definition of "development" in Hawaii Revised Statutes chapter 205A and County of Hawaii Planning Commission Rule 9. The single-family residence can be found exempt from SMA permit requirements, permitted by the DLNR, and built even if there is no new driveway. The kuleana has legal access to a public road over the "old road."

Your letter of August 19, 2009, states:

> 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 Coast 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 trial 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.

This finding represents a completely unjustified deprivation of a well-established kuleana access right. A kuleana owner does not require permission from DLNR or SHPD or NAH to use an established roadway which was actually historically used for kuleana access. The kuleana owners of parcel 12 have legal right to use this road and neither the State nor the Planning Department has any right to prevent them from using the road. To any extent the road started out as a trail, this would only reinforce the kuleana owners' right to use the road because it suggests kuleana tenants have used that route for access well before as well as after the creation of automobiles.

We strongly recommend that the Department review its position with regard to kuleana access with the Office of Corporation Counsel, the Attorney General's office, and Office of Hawaiian Affairs. Please see:

HRS § 1-1;
HRS § 7-1;
Kalalukoa v. Keawe, 9 Haw. 191, 192 (1893);
Henry v. Ahlo; 9 Haw. 490 (1894);
Rogers v. Pedro, 642 P.2nd 549 (1982);
Palama v. Sheehan, 440 P.2d 95 (1968);
Haiku Plantation v. Lono; 618 P.2d 312 (1980); and
Bremer v. Weeks; 85 P.3d, 150 (Haw. 2004).

This is a serious matter which we hope your Department will address immediately.

Finally, this is a kuleana parcel in the State conservation district. The Board of Land and Natural Resources is the agency responsible for reviewing and approving land use in the conservation district. HRS 183C-5 and Hawaii Administrative Rule ("HAR") § 13-5-222, P-3, are very clear in stating that even the State cannot prevent a kuleana owner from using the kuleana for residential purposes if the kuleana was historically and actually been used for residential purposes. The owners have established that this parcel is a kuleana that was awarded as a house lot and was actually used for residential purposes. The owners are legally entitled to continue that use.

The SMA law expressly provides that single-family residences are exempt from SMA Permit requirements. There is obviously no basis for the Department to delay making the determination that the proposed use is exempt. The use of a kuleana for residential purposes is a traditional and cultural practice and to deny or impede this right does direct and significant harm to the protection and preservation of cultural resources.

Please process the exemption. Unfortunately, we may again be required to appeal from a Department decision because it is not only wrong, but contains statements and embedded findings which we need to contest so as not to be estopped from challenging them as this matter proceeds.

Very truly yours,

Roy A. Vitousek III
for
CADES SCHUTTE
A Limited Liability Law Partnership

RAV:tmt/bah