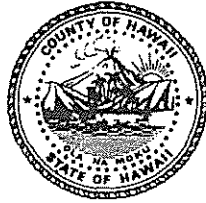


William P. Kenoi
Mayor



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

March 11, 2010

Ms. Lori Mikkelson
ALL AINA SERVICES
PO Box 291
Laupahoehoe, Hawai'i 96764

Dear Ms. Mikkelson:

SUBJECT: VARIANCE- VAR-09-049
Applicant: ALL AINA SERVICES
Owners: RICHARD PARTOSAN
Request: Variance from Chapter 25, zoning, Article 5, Division 7, Section 25-5-76, Minimum Yards, (a), Section 25-5-77 Other regulations, and Article 4, Division 4 Section 25-4-44, Permitted projections into yards and open space requirements
TMK: 1-2-036:090 (Lot 35)

After reviewing your variance application, the Planning Director certifies the **approval** of Variance No. 09-049 (VAR 09-049), subject to the following conditions. The variance will allow portions of the detached Guesthouse to remain, subject to the conditions set forth by the Department of Public Works, Building Division, and the dwelling's detached water tank to remain upon the subject property with a minimum 10.66 feet front yard in lieu of minimum 15.0 feet front yard(s) requirement. The variance is from the subject property's minimum front and side yards and minimum front and side yards open space requirements pursuant to the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), Section 25-5-77 Other regulations, and Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open space requirements, (a).

MAR 17 2010

BACKGROUND AND FINDINGS

1. Location. The subject property consists of 8,789 square feet in land area and is situated within the Kalapana Sea View Estates Subdivision, Puna, Hawai'i. The subject property's street address is 12-184 W. Moanauli Loop. The subject property is zoned Agricultural – 1 Acre (A-1a) by the County and designated Agricultural or "A" by the State Land Use Commission (LUC).
2. Variance Application-Site Plan. The applicant, on behalf of the owners, submitted the variance application, attachments, and filing fee on November 10, 2009 and other submittals related to the variance request and variance application. The variance application's site plan map is drawn to scale and prepared by Roy G. Hollowell, LPLS. The variance site plan map, dated August 10, 2009, denotes the position of detached Guest House and detached Water Tank constructed into minimum 15-foot wide front and 8 foot side yard setback and minimum 10-foot wide front and 4-foot side yard open space.

3. County Building Records:

Hawaii County Real Property Tax Office records indicate that a building permit (B2007-2087H) was issued to the subject property for an as-built, two-story, single-family dwelling consisting of 3 bedrooms, 2 baths, living room, recreation room, kitchen and dining area, detached carport/storage and galvanized steel water tank. Along with a one story-guest house attached by covered breezeway.

4. Variance Application (VAR09-049)-Agency Comments and Requirements:

- a. The State Department of Health (DOH) memorandum dated November 24, 2009 states:

“The Health Department found no environmental health concerns with regulatory implications in the submittals.”

- b. The Department of Public Works (DPW) memorandum dated December 15, 2009 states:

“We have reviewed the subject application forwarded by your memo dated November 12, 2009 and require approval of the application be conditioned as noted below.

The guest house overhang must be removed completely or cut back a minimum of 12 inches from the property line and must be one hour fire-resistive construction

wherever it is within three (3) of the property line. A building permit will be required for the overhang alteration.

Please refer questions to the Building Division at 961-8331.

5. Notice to Surrounding Property Owners. The applicant filed a transmittal letter and copy of notices sent to surrounding property owners via USPS to the Planning Department. According to the Affidavit and USPS certificate of mailing receipts along with affixed postal receipts, the first and second notice were mailed on September 24, 2009 and November 25, 2009, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on November 20, 2009.
6. Comments from Surrounding Property Owners or Public. No further written agency comments were received. No written comments or objections from surrounding property owners of the general public were received.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant/owner submitted the variance application to address and/or resolve the detached guest house and detached water tank encroachments within the property's minimum 15 feet front and 8 feet side yard. The variance application's site plan denotes the location of the Guest House and water tank upon "Lot 35". Pursuant to the applicant's background information, the owners were unaware of any encroachment when they purchased the property and would not have discovered any problems affecting the Guest House and detached water tank until a modern survey was conducted on August 10, 2009 by Roy G. Hollowell, LPLS, revealing the setback violations. No evidence has been found to show indifference or premeditation by the builder to intentionally construct a portion of the guest house and detached Water Tank into the property's minimum 15 feet front and 8 feet side yard setback and attendant minimum 4 feet side yard open space required by the Zoning Code.

ALTERNATIVES

Alternatives available to the current owners to correct and/or address the building encroachments constructed into the affected front and side-yard and open space of the subject property include the following actions:

Remove the building encroachments and/or redesigning or relocating the Guest House and Water Tank constructed upon the subject property to fit within the correct building

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envelope denoted on the recent survey map as prescribed by the Zoning Code. Any structural or design correction would be expensive and cost prohibitive.

Consolidate the subject property with adjoining property and resubdivide the property to modify property lines and adjust minimum yard setbacks. Given the location of the encroachments (front and side yard), consolidation/resubdivision with the adjoining property would not be practical.

INTENT AND PURPOSE

The intent and purpose of requiring building setbacks within a subdivision are to assure that adequate air circulation and exposure to light are available between permitted structure(s)/uses and boundary/property lines.

It appears that the portion of the guest house and detached water tank was improperly situated on the subject property, which went undisclosed until a modern survey was completed. The survey map prepared for the landowner shows the extent of the encroachment within the minimum front and side yard and its open space requirement. It appears that the guest house, modified to meet Department of Public Works, Building Division conditions and detached water tank, in its current location, will not be physically and/or visually obtrusive from other properties situated within the immediate area. This can be substantiated, to some degree, by the fact that this office did not receive any complaint from surrounding property owners during the roughly two-plus years since the guest house and water tank were being constructed. As such, it is felt that the issuance of this variance will not depreciate or detract from the character of the immediately surrounding properties.

Based on the foregoing findings and unusual circumstances, the representative's request for variance 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 request 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.

The applicant's variance application was acknowledged by letter dated November 12, 2009, and additional time to review the application was required. The applicant granted the Planning Department and Planning Director an extension of time to decide on the variance application to March 20, 2010.

PLANNING DIRECTOR'S DECISION AND VARIANCE CONDITIONS

This variance application is approved subject to the following variance conditions:

1. The applicant/owner, their assigns or successors shall be responsible for complying with all stated conditions of approval.
2. The applicant/owner(s), successors or assigns shall indemnify and hold the County of Hawaii harmless from and against any loss, liability, claim, or demand for the property damage, personal injury, or death arising out of any act or omission of the applicants/owners, their successors or assigns, officers, employees, contractors, or agents under this variance or relating to or connected with the granting of this variance.
3. No permit shall be granted to allow an ohana or second-single family or farm dwelling upon the subject TMK property, subject to provisions of the Zoning Code or State Law which may change from time to time.
4. The as-built guest house and water tank built upon the subject property ("LOT 35") will not meet the minimum front and side yards requirements pursuant to Chapter 25, the Zoning Code, according to the variance application's site plan map. The approval of this variance permits portions of the as-built guest house to remain upon subject TMK property or "LOT 35" subject to the conditions of the Department of Public Works, Building Division. The variance also allows for the detached Water Tank to remain according to the site plan map submitted with the variance application.
5. The owner shall comply with Department of Public Works memo stating:

"We have reviewed the subject application forwarded by your memo dated November 12, 2009 and require approval of the application be conditioned as noted below.

The guest house overhang must be removed completely or cut back a minimum of 12 inches from the property line and must be one hour fire-resistive construction wherever it is within three (3) of the property line. A building permit will be required for the overhang alteration.

6. Should the as-built guest house and water tank (footprint) upon the subject property be destroyed by fire or other natural causes, the replacement or the new guest house and water tank shall comply with the County Zoning Code and be subject to State law and County ordinances and regulations pertaining to building

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construction occupancy.

7. Future or new building improvements and permitted uses shall be subject to State law and County ordinances and regulations pertaining to building construction and building occupancy.

Should any of the foregoing variance conditions not be complied with, the Planning Director may proceed to declare subject Variance- 09-049 null and void.

Sincerely,



BJ LEITHEAD TODD
Planning Director

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xc: Real Property Tax Office (Hilo)