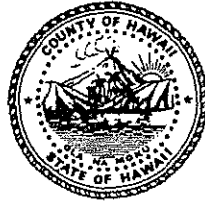


William P. Kenoi
Mayor



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 7, 2010

Mr. James H. Ferguson
12-7024 Kehauopuna Street
Pahoa, Hawai'i 96778

Dear Mr. Ferguson:

SUBJECT: VARIANCE-- VAR-10-003

Applicant: JAMES H. FERGUSON

Owners: JAMES H. FERGUSON & MARCIA A. DAY

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: 1-2-039:075 (Lot 127)

After reviewing your variance application, the Planning Director certifies the **approval** of Variance No. 10-003 (VAR 10-003), subject to the following conditions. The variance will allow portions of the single family dwelling with a minimum 9.04 feet rear yard and detached water tank with a minimum 6.59 feet rear yard to remain on the subject property in lieu of the minimum 15.0 feet rear yard(s) requirement and attendant 10 feet rear yard open space required. The variance is from the subject property's minimum rear yard and rear yard 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).

JUN 10 2010

BACKGROUND AND FINDINGS

1. Location. The subject property consists of 7,500 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 12-7024 Kehauopuna Street. The subject property is zoned Agricultural – 3 Acre (A-3a) 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 February 18, 2010, 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 Hawaii Independent Surveyors, LLC. The variance site plan map, dated March 7, 2005, denotes the position of Single Family Dwelling and detached Water Tank constructed into minimum 15-foot wide rear yard setback and minimum 10-foot wide rear yard open space requirements.
3. County Building Records:

Hawaii County Real Property Tax Office records indicate that a building permit (B2004-1503H) was issued to the subject property for a single-story, single-family dwelling consisting of 2 bedrooms, 2 baths, living room, kitchen and dining area, detached carport/storage and galvanized steel water tank.
4. Variance Application (VAR10-003)-Agency Comments and Requirements:
 - a. The State Department of Health (DOH) memorandum dated May 11, 2009 states:

“The Health Department found no environmental health concerns with regulatory implications in the submittals.”
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 February 24, 2010 and May 14, 2010, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on May 13, 2010.

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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 single family residence and detached water tank encroachments within the property's minimum 15 feet rear yard. The variance application's site plan denotes the location of the single-family dwelling and water tank upon "Lot 127". 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 single family dwelling and detached water tank until a modern survey was conducted on March 7, 2005 by Hawaii Independent Surveyors, LLC, revealing the setback violations. No evidence has been found to show indifference or premeditation by the builder to intentionally construct a portion of the single family dwelling and detached water tank into the property's minimum 15 feet rear yard setback and attendant minimum 10 feet rear 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 rear yard and open space of the subject property include the following actions:

Remove the building encroachments and/or redesigning or relocating the Single-Family dwelling and Water Tank constructed upon the subject property to fit within the correct building 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 (rear yard), consolidation/resubdivision with the adjoining property would not be practical.

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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.

Based on the foregoing findings and unusual circumstances, the applicant'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. This can be substantiated, to some degree, by the fact that this office did not receive any complaint from surrounding property owners during the 6 years of existence of the structure. Also, no comments or objections were received from the surrounding property owners or general public in response to the Notification of Surrounding Properties Owners.

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.

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.

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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 single family dwelling and water tank built upon the subject property ("LOT 127") will not meet the minimum rear yard requirements pursuant to Chapter 25, the Zoning Code, according to the variance application's site plan map.
5. Should the as-built single family dwelling and water tank (footprint) upon the subject property be destroyed by fire or other natural causes, the replacement or the new single family dwelling and water tank shall comply with the County Zoning Code and be subject to State law and County ordinances and regulations pertaining to building construction occupancy.
6. 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- 10-003 null and void.

Sincerely,



BJ LEITHEAD TODD
Planning Director

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xc: Real Property Tax Office (Hilo)