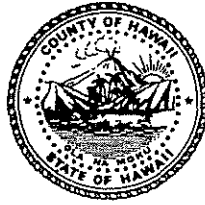


William P. Kenoi
Mayor



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

October 25, 2010

Mr. Jerry M. O'Malley et al.
RR 2 4663
Pāhoa, Hawai'i 96778

Dear Mr. O'Malley:

SUBJECT: VARIANCE: VAR-10-024

**Applicant: JERRY MARTIN &
LESLIE SASHA BORISOVNA O'MALLEY**

Owners: ERIC & JENNIFER ROSSE

**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: 1-2-039:045 (Lot 157)

After reviewing your variance application, the Planning Director certifies the **approval** of Variance No.10-024 (VAR 10-024), subject to the following conditions. The variance will allow portions of the detached water tank with a minimum 4.67 feet rear yard and rear yard open space to remain on the subject property in lieu of the minimum 15.0 feet rear yard and minimum 10.0 feet rear yard open space requirement. The variance is from the subject property's minimum rear yard and rear yard open space requirements pursuant to the Hawai'i 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).

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 12-7015 Pu'ulena 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 July 19, 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 the applicant, denotes the position of the detached water tank constructed into minimum 15-foot wide rear yard setback requirement and 10-foot rear yard open space requirement.

3. County Building Records:

Hawai'i County Real Property Tax Office records indicate that a building permit (B2005-3282H) was issued to the subject property for a two-story, single-family dwelling consisting of 2 bedroom, 2 bath, living room, kitchen and dining area, garage and galvanized steel water tank.

4. Variance Application (VAR10-024)-Agency Comments and Requirements:

- a. The State Department of Health (DOH) memorandum dated September 13, 2010 states:

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

- b. No comments were received from the Department of Public Works – Building Division as of this date.

5. Notice to Surrounding Property Owners.

The applicant filed a transmittal letter and copy of the notices was sent to surrounding property owners via USPS to the Planning Department. According to USPS certificate of mailing receipts and affixed postal receipts, the first and second notices were mailed on May 7, 2010 and September 20, 2010, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on September 17, 2010.

6. Comments from Surrounding Property Owners or Public.

- a. A phone call was received on May 11, 2010 from Joanne Jamieson (TMK: 1-2-039:037) in support of the variance application (see attached e-mail from Shancy Grilho, Zoning Clerk).

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-foot rear yard setback and 10-foot rear yard open space requirement. The variance application's site plan denotes the location of the single-family dwelling and water tank upon "Lot 157". Pursuant to the owner's background information, the owner (Eric & Jennifer Rosse) stated in part, *"When I designed this house, I planned on a 12' diameter water tank. When I went to purchase the tank, there were no 12' diameter tanks in stock, so I got an 18 feet tank. These were rushed times, and I didn't realize that the larger tank would encroach into the setbacks."* No evidence has been found to show indifference or premeditation by the builder to intentionally construct a portion of the detached water tank into the property's minimum rear yard setback 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 of the subject property include the following actions:

Remove the building encroachments and/or redesign or relocate the water tank constructed upon the subject property to fit within the correct building envelope denoted on the recent plot map as prescribed by the Zoning Code. Any structural or design correction would be expensive and cost prohibitive.

Consolidate the subject property with adjoining properties and resubdivide the property to modify property lines and adjust minimum yard setbacks. Given the location of the encroachments (rear 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 or development 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 two 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.
3. No permit shall be granted to allow an ohana or second-single family or farm dwelling upon the subject property, subject to provisions of the Zoning Code or State Law which may change from time to time.
4. The as-built water tank built upon the subject property ("LOT 157") will not meet the minimum side yard requirements pursuant to Chapter 25, the Zoning Code, according to the variance application's site plan map.
5. Should the water tank (footprint) upon the subject property be destroyed by fire or other natural causes, the replacement 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.

Mr. Jerry O'Malley
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Should any of the foregoing variance conditions not be complied with, the Planning Director may proceed to declare subject Variance- 10-024 null and void.

Sincerely,

A handwritten signature in black ink, appearing to read "BJ Leithhead Todd". The signature is written in a cursive, somewhat stylized font.

BJ LEITHEAD TODD
Planning Director

LHN:kwr

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xc: Real Property Tax Office (Hilo)