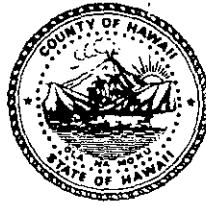


William P. Kenoi
Mayor



BJ Leithead Todd
Director

Margaret K. Masunaga
Deputy

West Hawai'i Office
74-5044 Ane Keohokaiole Hwy
Kailua-Kona, Hawai'i 96740
Phone (808) 323-4770
Fax (808) 327-3563

County of Hawai'i
PLANNING DEPARTMENT

East Hawai'i Office
101 Pauahi Street, Suite 3
Hilo, Hawai'i 96720
Phone (808) 961-8288
Fax (808) 961-8742

December 20, 2012

Brett and Michelle Smith
P. O. Box 6044
Kamuela, HI 96743

Dear Mr. & Mrs. Smith:

SUBJECT: Application: VARIANCE – VAR-12-000104
Applicant: BRETT AND MICHELLE SMITH
Owners: BRETT AND MICHELLE SMITH
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 (Encroachment into Western Side Yard Setback)
TMK: 6-4-021:071, Lot 170

Upon reviewing your variance application, the Planning Director certifies the **approval** of Variance No. 12-000104 (VAR: 12-000104), subject to variance conditions. The variance is to allow corners of the single-family dwelling's master bathroom, office, front deck and attendant roof eave to remain on Lot 170 with a minimum 2.3 feet to a minimum 4 feet in lieu of the minimum required 10-foot side yard setback and associated 5-foot side yard open space requirements measured from the property's west side boundary line and according to the submitted site plan. The variance is from the subject property's minimum 10-foot side yard requirements pursuant to the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 7, Section 25-5-76, Minimum yards, and Article 4, Division 4 Section 25-4-44, Permitted projections into yards and open space requirements.

BACKGROUND AND FINDINGS

1. **Location.** The subject property consists of approximately 14,735 square feet of land, within the Puu Nani Subdivision, Kamuela, South Kohala, Hawai'i. The subject property's street address is 64-648 Puu-Pohu Place.

2. **Zoning.** The subject property is zoned Agriculture – 1 acre (A-1a) by the County and has a designation of State land use Agricultural (A).
3. **Variance Application-Site Plan.** The owner submitted the variance application, attachments, and filing fee on October 22, 2012 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 Roger D. Fleenor, LPLS. The variance site plan denotes that portions of the single family dwelling are built into the property's minimum 10-foot wide side yard setback.
4. **County Building Records.** Hawai'i County Real Property Tax Office records indicate that a building permit (#901081) was issued on May 25, 1990 for the construction of a 4 bedroom, 2 baths Single-Family Dwelling; and additional permit (#961019) was issued on July 30, 1996 for the master bedroom, master bath and walk-in closet addition.
5. **Variance Application (VAR: 12-000104)-Agency Comments and Requirements.**
 - a. The State Department of Health (DOH) memorandum dated October 30, 2012. (see attached)
 - b. No comments were received from the Department of Public Works – Building Division.
6. **Notice to Surrounding Property Owners.**

A copy of first and second notices sent by the applicant via USPS to surrounding property owners and mailing certificates were submitted to the Planning Department. According to these submittals, the first notice was mailed on July 23, 2009 and the second notice was mailed on November 2, 2012, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on November 14, 2012.
7. **Comments from Surrounding Property Owners or Public.**

Support letter dated on August 18, 2012 and received on October 22, 2012, from Rudy deRochemont. (see attached)

GROUNDS FOR APPROVING VARIANCE

Special and Unusual Circumstances

- (a) There are special or unusual circumstances applying to the subject real property which exist either to a degree which deprives the owner or applicant of substantial

property rights that would otherwise be available, or to a degree which obviously interferes with the best use or manner of development of the property.

The owner/applicant submitted the variance application to address or resolve the encroachment of the single-family dwelling into the 10 foot side (west) yard setback and 5-foot side yard open space as required by the Zoning Code.

The owner/applicant has stated in its background report that they were misinformed by the previous owner as to the placement of the boundary pins when they purchased the single-family dwelling and that all additions were based on the original staking and original house plot plan provided by the previous owner.

The owner was unaware of any encroachment when he purchased the property and would not have discovered any problems affecting the single-family dwelling additions until an as-built survey, which was completed on October 10, 2012 by Roger D. Fleenor, LPLS, revealed the encroachments. No evidence has been found to show indifference or premeditation by the builder to intentionally construct portions of the single family dwelling into the property's minimum 10 feet side (west) yard setback required by the Zoning Code.

The owner of the adjacent property (Lot 173), which is most affected by the encroachments, has sent a letter endorsing the approval of the variance request.

Alternatives

(b) There are no other reasonable alternatives that would resolve the difficulty.

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

Remove the building encroachments and/or redesigning or relocating the as-built single-story dwelling 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.

Another alternative is to consolidate the subject property with the adjoining side property which is owned by someone else and to resubdivide the property to modify property lines and adjust minimum yard setbacks. Both these alternatives are not practical and would be costly.

Intent and Purpose

(c) The variance is consistent with the general purpose of the district, the intent and purpose of this chapter, and the general plan, and will not be materially detrimental

to the public welfare or cause substantial, adverse impact to an area's character or to adjoining properties.

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.

Further, no comments or objections were received from agencies, surrounding property owners or the general public.

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 office has not received any complaints from surrounding property owners during the 22 years that the structure has existed.

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. The existing dwelling constructed upon the subject property (Lot 170) will not meet the minimum rear yard pursuant to Chapter 25, the Zoning Code, according to the variance application's site plan dated October 10, 2012. The approval of this variance permits the existing dwelling to remain upon the subject property or "Lot 170" in accordance to the survey map dated October 10, 2012.
4. No permit shall be granted to allow an ohana or second 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.
5. Should the existing dwelling upon the subject property be destroyed by fire or other natural causes, the replacement or the new single family dwelling shall comply with the County Zoning Code and be subject to State law and County ordinances and regulations pertaining to building construction occupancy.

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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-VAR 12-000104 null and void.

Sincerely,

A handwritten signature in black ink, appearing to read "BJ Leithead Todd". The signature is written in a cursive, flowing style.

BJ LEITHEAD TODD
Planning Director

LHN: nci

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xc: Real Property Tax Office (Hilo)

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NEIL ABERCROMBIE
GOVERNOR
COUNTY OF HAWAII

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LORETTA J. FUDDY, A.C.S.W., M.P.H.
Director of Health

STATE OF HAWAII
DEPARTMENT OF HEALTH
P.O. BOX 916
HILO, HAWAII 96721-0916

MEMORANDUM

DATE: October 30, 2012
TO: Bobby Jean Leithead Todd
Planning Director, County of Hawaii
FROM: Newton Inouye *NI*
District Environmental Health Program Chief
SUBJECT: VARIANCE APPLICATION-VAR 12-000104
Applicant: BRETT AND MICHELLE SMITH
Owners: BRETT AND MICHELLE SMITH
Request: Variance from Chapter 25, Zoning, Section 25-5-76
Minimum Yards and Section 25-4-44(a), Permitted
Projections into Yards and Open Space Requirements
(Encroachment into western side yard setback)
Tax Map Key: 6-4-021:071, Lot 170

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

WORD:VAR 12-000104.my

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August 18, 2012

Re: Adjacent properties in Puu Nani Subdivision, Kamuela HI


To whom it may concern,

I was informed that my neighbors Brett and Michelle Smith, who own the property (TMK 2-6-4-0211 Lot 170) adjacent to mine (TMK 3-6-4-021-068 Lot 173), are applying for a side yard setback variance. Apparently parts of their dwelling encroach on our shared property line according to code. I hereby state that the above mentioned variance shall not have an adverse impact on my dwelling and will not affect the character of my property and the neighborhood.

For any further questions please contact me:

64-5232 Puu Nani Dr.
Kamuela, HI 96743
Phone: 808 885-6645

Respectfully yours,



Rudy deRochemont