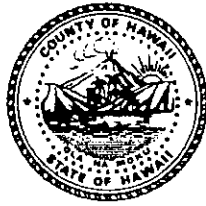


William P. Kenoi
Mayor



BJ Leithead Todd
Director

Margaret K. Masunaga
Deputy

West Hawai'i Office
74-5044 Ane Keohokalole Hwy
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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

May 29, 2013

Mr. Don Merryman
77-6481 Ono Road
Kailua-Kona, HI 96740

Dear Mr. Merryman:

SUBJECT: Application: VARIANCE - VAR-13-000126
Applicant: DON L. MERRYMAN
Owners: DON L. AND PENNY A. MERRYMAN
Request: Variance from Chapter 25, Zoning, Article 5,
Division 1, Section 25-5-7, Minimum Yards, and Article 4,
Division 4 Section 25-4-44(a), Permitted Projections into
Yards and Open Space Requirements (Encroachment into
East Side Yard Setback)
TMK: 7-7-013:067, Lot 27

After reviewing your variance application, the Planning Director certifies the **approval** of Variance No. 13-000126 (VAR-13-000126), subject to variance conditions. The variance will allow portions of the single-family dwelling to remain with a 18.50 to 18.80 foot rear (east) yard setback, in lieu of the required 20-foot rear yard setback, and the open deck and stairway to remain with a 8.40 to 10.70 rear (east) yard open space, in lieu of the minimum 14 foot side yard open space requirement, as required by the Hawaii County Code, Chapter 25, Zoning, Section 25-5-7, Minimum yards and Article 4, Division 4, Section 25-4-44(a), Permitted projections into yards and open space requirements (a).

BACKGROUND AND FINDINGS

1. **Location.** The subject property, consisting of approximately 15,571 square feet of land, is located in the Hōlualoa Estates Subdivision situated at Hōlualoa 4th, North Kona, Hawai'i. The subject property's street address is 77-013 Ono Road.
2. **Zoning.** Single-Family Residence-15,000 sq. ft. (RS-15)
3. **State Land Use.** Urban (U)

4. **Required Setback.** 20 feet for front and rear; 10 feet for sides.
5. **Variance Application-Site Plan.** The applicant submitted the variance application, attachments, and filing fee on March 8, 2013, 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 Pattison Land Surveys (Thomas G. Pattison, LPLS) denotes the portions of the two-story, single-family dwelling built into the eastern rear yard setback.
6. **Time Extension.** The applicant's variance application was acknowledged by letter dated March 18, 2013 and additional time to review the application was required. The applicant granted the Planning Department and Planning Director an extension of time for decision on the Variance Application to May 31, 2013.
7. **County Building Records.** Hawaii County Real Property Tax Division records indicate that a building permit (07772) was issued on October 10, 1986, for the construction of a 3-bedroom and 3 bath single-family residence and an attached 2-car garage.
8. **Agency Comments and Requirements.**
 - a. The State Department of Health (DOH) memorandum, dated March 21, 2013. (Refer to attached DOH memorandum.)
 - b. No comments were received from the Department of Public Works–Building Division.
9. **Notice to Surrounding Property Owners.** A copy of first notice and second notice sent by the applicant via USPS to surrounding property owners and mailing certificates was submitted to the Planning Department. According to these submittals, the first and second notices were mailed via the USPS on March 12, 2013 and May 8, 2013, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on March 27, 2013.
10. **Comments from Surrounding Property Owners or Public.** No written comments or objections from surrounding property owners or general public were received by the Planning Department.

GROUND 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 variance application meets criteria (a) for the following reasons:

The owner/applicant submitted the variance application to address or resolve the encroachment of the single-family dwelling into the 20-foot rear (east) yard setback and the open deck into the rear (east) yard open space as required by the Zoning Code.

The survey map prepared by Thomas G. Pattison L.P.L.S shows that the northeasterly corner of the single family dwelling encroaches 1.20 feet and the southeast corner of the single-family residence encroaches 1.50 feet into the rear yard setback. The open deck is 8.40 feet to a minimum 10.70 feet from the rear (east) boundary line.

The owner, who recently purchased the property was unaware of any encroachments and would not have discovered any problems affecting the subject property until a recent survey was completed.

No evidence has been found to show indifference or premeditation by the past owners or builders to deliberately create or intentionally allow the building encroachment problems to occur. It appears that the original dwelling improvements constructed nearly 27 years ago, were constructed under valid building permits and other construction permits issued by the County. It also appears that past building permits inspections of the premises by the agencies during construction of the dwelling improvements did not disclose any building encroachment issues or building setback irregularities at that time. Further, due to the approximate one-foot encroachments in the rear and southeast corner of the property, it appears that this was an error and not intentional.

The CRM (concrete, rock, masonry) walls on the property that cross the southern boundary line is covered by an "Encroachment Agreement" dated August 3rd, 2009 and recorded with the State of Hawai'i Bureau of Conveyances (Document 2009-118735).

The above special and unusual circumstance determines the applicant was not at fault in creating the encroachment violation and requiring them to fix the encroachments would interfere with the best use and development of the property.

Alternatives

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

The variance application meets criterion (b) for the following reasons:

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 redesign or relocate the 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

of the single-family dwelling, deck and stairs to meet setback and open space requirement would diminish the functionality of the improvements and be impracticable due to the existing layout and design of structure, as well the topography of the property.

Another alternative is to consolidate the subject property with the adjoining side property which is owned by someone else and to re-subdivide the property to modify property lines and adjust minimum yard setbacks. Both of these alternatives are not reasonable and practical.

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

The variance application meets criteria (c) for the following reasons:

The intent and purpose of requiring building setbacks on a lot 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 complaints from surrounding property owners during the roughly 27 years since the single family dwelling was constructed. Further, objections were not received from the surrounding property owners or general public in response to the Notification of Surrounding Property Owners. 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 above findings, granting of the variance would be consistent with the criteria and intent of approving a variance

PLANNING DIRECTOR'S DECISION AND VARIANCE CONDITIONS

This variance request is **approved** subject to the following 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

Mr. Don L. Merryman
Page 5
May 29, 2013

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 be changed from time to time.
4. Portion of the single family dwelling built upon the subject property ("LOT 27") will not meet the minimum side yard requirements pursuant to Hawai'i County Code, Chapter 25, (Zoning Code), in accordance to the site map dated March 4, 2013.
5. Should the single-family dwelling (footprint), including the deck and stairway, on the subject property be destroyed by fire or other natural causes, the replacement structure shall comply with the Hawai'i County Code, Chapter 25, (Zoning) 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 VAR-13-000126 null and void.

Sincerely,



BJ LEITHEAD TODD
Planning Director

LHN:nci

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xc: Planning Department (Kona)
Real Property Tax Division (Kona)
Terry, Dunlap, KCDP
Gilbert Bailado, Planning GIS

Mr. Don L. Merryman
Page 6
May 29, 2013

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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: March 21, 2013
TO: Bobby Jean Leithead Todd
Planning Director, County of Hawaii
FROM: *NI*
Newton Inouye
District Environmental Health Program Chief
SUBJECT: VARIANCE – VAR-13-000126
DON L. AND PENNY A. MERRYMAN
Variance from Chapter 25, Zoning, Section 25-5-7
Minimum Yards and Section 25-4-44(a), Permitted
Projections into Yards and Open Space Requirements
(Encroachment into Eastern Rear Yard Setback)
TMK: 7-7-013:067, Lot 27

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