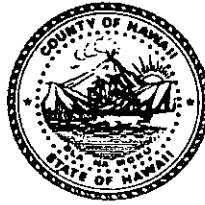


William P. Kenoi  
Mayor



Duane Kanuha  
Director

Bobby Command  
Deputy Director

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**County of Hawai'i**  
**PLANNING DEPARTMENT**

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August 12, 2013

Ms. Angela Berry-Jacoby  
4435 Bellingham Avenue  
Studio City, CA 91604

Dear Ms Berry-Jacoby:

**SUBJECT: VARIANCE APPLICATION – VAR-13-000144**  
**Applicant: ANGELA BERRY-JACOBY**  
**Owners: SCOTT GIBBONS & ANGELA BERR-JACOBY**  
**Request: Variance from Chapter 25, Zoning, Article 5,**  
**Division 1, Section 25-5-7, Minimum Yards and Section 25-**  
**4-44(a), Permitted Projections into Yards Open Space**  
**Requirements (Encroachment into South and Southeast**  
**Side Yard Setback together with west side yard and rear**  
**east open space setback)**  
**TMK: 7-7-019:048, Lot 48A**

After reviewing your variance application, the Planning Director certifies the **approval** of VAR-13-000144, subject to variance conditions. The variance will allow portions of the single-family dwelling to remain "as built" with a 7.38 foot side (south) yard setback and a 9.02 side (southeast) yard setback in lieu of the required 10-foot side yard setback, together with a 2.92 side (west) yard and a minimum 11.35 to a minimum of 12.30 rear (east) yard open space in lieu of the required 5-foot side yard and 14-foot rear yard open space requirement, as required by the Hawaii County Code, Chapter 25, Zoning, Section 25-5-7, Minimum yards and Section 25-4-44(a), Permitted Projections into Yards Open Space Requirements

**BACKGROUND AND FINDINGS**

1. **Location.** The subject property, consisting of approximately 10,846 square feet of land, is located in the Kuakini Heights Subdivision situated at Kapala'alaea 1<sup>st</sup>, North Kona, Hawai'i. The subject property's street address is 77-348 Emalia Place.
2. **Zoning.** Single-Family Residence–10,000 sq. ft. (RS-10).

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 June 13, 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 Thomas G. Pattison, LPLS (Pattison Land Surveying, Inc.) denotes the portions single-family dwelling built into the south and southeast side yard setback and roof eave built into the side (west) and rear (east) open space requirement.
6. **County Building Records.** Hawaii County Real Property Tax Division records indicate that a building permit (B02952) was issued on May 19, 1978, for the construction of a 3-bedroom and 2-bath single-family residence and an attached 2-car garage. Additional building permits were issued on August 25, 1980 (B 04491) and on November 17, 1981 (B05188) for additions/alterations to the single-family dwelling.
7. **Agency Comments and Requirements.**
  - a. No comments were received from the State of Hawai'i -- Department of Health.
  - b. No comments were received from the Department of Public Works--Building Division.
8. **Notice to Surrounding Property Owners.** The applicant submitted a copy of notice sent to surrounding property owners, including affidavits, stating notices were mailed to surrounding property owners by U.S.P.S. According to these submittals, the first and second notice(s) were mailed on June 18, 2013 and June 30, 2013, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on June 26, 2013.
9. **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.

#### **ANALYSIS OF GROUNDS FOR VARIANCE**

No variance will be granted unless it is found that:

- (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 10-foot south and southeast side yard setback and the 5-foot west side yard and 14-foot east rear yard open space as required by the Zoning Code.

The survey map prepared by Thomas G. Pattison, L.P.L.S shows that portions of the single family dwelling encroaches 2.62 feet and 0.98 (11.76 inches) feet into the 10-foot side (south and southeast) yard setback, respectively. In addition, the roof eaves intrude 2.08 feet into the west side yard open space and a minimum of 1.70 feet to a minimum of 2.65 feet into the east rear yard open space requirement.

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 34 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.

The above special and unusual circumstance, determine the owner 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.

**(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 side yard setbacks and side and rear yard open space of the subject property include the following actions:

Remove the building encroachments and/or redesign or relocate the two-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 leave large and unattractive reconstruction disfigurement to the single-family dwelling. This alternative would be deemed unreasonable, especially when the owners complied with the building permit process and were under the impression that the single-family dwelling was in compliance with all County requirements.

Another alternative is to consolidate the subject property with the adjoining side and rear

properties which are owned by other parties, and to resubdivide the property to modify property lines and adjust minimum yard setbacks. Both of these alternatives are not practical.

Therefore, there are no reasonable alternatives to resolve the encroachment issue.

- (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 intent and purpose 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 34 years since the single family dwelling and attached garage 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 Hawaii harmless from and against any loss, liability, claim, or demand for the property

Angela Berry-Jacoby

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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. Portions of the single-family dwelling built upon the subject property ("LOT 48A") will not meet the minimum front yard requirements pursuant to Hawai'i County Code, Chapter 25, (Zoning Code), in accordance to the site map dated February 15, 2013.
5. Should the single-family dwelling (footprint) 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 occupancy.

Should any of the foregoing variance conditions not be complied with, the Planning Director may proceed to declare subject Variance VAR-13-000144 null and void.

Sincerely,



DUANE KANUHA  
Planning Director

LHN:nci

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