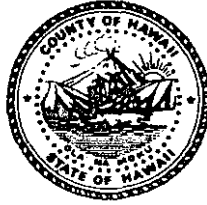


William P. Kenoi
Mayor



Duane Kanuha
Director

Bobby Command
Deputy Director

West Hawai'i Office
74-5044 Ane Keohokalole 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

October 11, 2013

Mr. Merrill S. Kittinger, Architect
P. O. Box 1226
Kailua-Kona, HI 96745

Dear Mr. Kittinger:

SUBJECT: VARIANCE APPLICATION – VAR-13-000154
Applicant: MERRILL S. KITTINGER, ARCHITECT
Owners: JOHN AND LINDA NYGREN
Request: Variance from Chapter 25, Zoning, Article 5, Division 7, Section 25-5-76, Minimum Yards and Article 4, division 4, Section 25-4-44(a), Permitted Projections into Yards and Open Space Requirements (Encroachment into South Rear Yard Setback)
TMK: 5-9-005:019, Lot 50-A

After reviewing your variance application, the Planning Director certifies the **approval** of VAR-13-000154, subject to variance conditions. The variance will allow portion of the existing detached 3-car garage to remain "as built" with an 18.20-foot to a minimum 25.90-foot rear (south) yard setback and the associated roof eave with an 15.70-foot rear (south) yard open space. These exceptions are in lieu of the required 30-foot rear yard setback and 24-foot rear yard open space, as required by the Hawaii County Code, Chapter 25, Zoning, Section 25-5-7, Minimum yards.

BACKGROUND AND FINDINGS

1. **Location.** The subject property, consisting of approximately 3.002 acres of land, is located in the Kohala View Estates Subdivision and is situated at Kahua and Waikato, North Kohala, Hawai'i. The subject property's street address is 59-224 Ala Kahua Drive.
2. **Zoning.** Agricultural – 3 acres (A-3a).
3. **State Land Use.** Agricultural (A).

4. **Required Setback.** 30 feet for front and rear; 20 feet for sides.
5. **Variance Application-Site Plan.** The applicant submitted the variance application, attachments, and filing fee on July 15, 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 Roger Fleenor, L.P.L.S denotes the portions 3-car garage built into the south rear yard setback.

The owner/applicant submitted the variance application to address or resolve the encroachment of the "as-built" 3-car garage into the 30-foot rear yard setback and the associated roof eave into the 24-foot rear yard open space as required by the Zoning Code.

The survey map prepared by Roger Fleenor, L.P.L.S. shows that portions of the "as-built" 3-car garage encroaches 4.1 feet and 11.8 feet into the 30-foot rear (south) yard setback and 8.3 feet into the rear (south) yard open space.

6. **County Building Records.** Hawaii County Real Property Tax Division records indicate that a building permit (871650) was issued on September 8, 1987, for the construction of a 3-bedroom and 2 bath single-family residence.
7. **Agency Comments and Requirements.**
 - a. The State Department of Health (DOH) memorandum, dated July 26, 2013. (See attached memorandum)
 - 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 mailed to surrounding property owners (including affidavits) by U.S.P.S. According to these submittals, the first and second notice(s) were mailed on July 15, 2013 and July 30, 2013, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on July 30, 2013.
9. **Time Extension.** The applicant's variance application was received on July 1, 2013 and additional time to review the application was required. The applicant granted the Planning Director an extension of time to issue a decision on the Variance Application until October 15, 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.

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 "as-built" 3-car garage into the 30-foot rear yard setback and the associated roof eave into the 24-foot rear yard open space as required by the Zoning Code.

The survey map prepared by Roger Fleenor, L.P.L.S. shows that portions of the "as-built" 3-car garage encroaches 4.1 feet and 11.8 feet into the 30-foot rear (south) yard setback and 8.3 feet into the rear (south) yard open space.

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 detached 3-car garage improvements was constructed nearly 22 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 determines 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 east side yard setback of the subject property include the following actions:

Remove the building encroachments and/or redesign or relocate the 3-car garage 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 to meet setback requirement would leave unattractive reconstruction scars.

Because the encroachment is within the front yard setback, to consolidate the subject property, with the roadway and to re-subdivide the property to modify property lines and adjust minimum front yard setbacks is not a viable option. 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.

The granting of the setback variance still allows for adequate air circulation as the affected area is within the front setback adjacent to roadway frontage.

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 22 years since the 3-car 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:

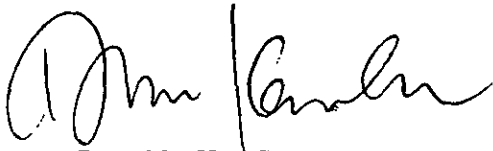
1. The applicant/owner, their assigns or successors shall be responsible for complying with

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 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 "as-built 3-car garage upon the subject property ("LOT 50-A") will not meet the minimum rear yard setback and rear yard open space requirements pursuant to Hawai'i County Code, Chapter 25, (Zoning Code), in accordance to the site map dated May 25, 2013.
5. Should the "as-built" 3-car garage (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-13-000154 null and void.

Sincerely,



DUANE KANUHA
Planning Director

LHN:nci

P:\Admin Permits Division\Variances From CoH02\Zone5\VAR13-000154TMK5-9-005-019Nygren.doc.rtf

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

NEIL ABERCROMBIE
GOVERNOR



LORETTA J. FUDDY, A.C.S.W., M.P.H.
PLANNING DEPARTMENT
COUNTY OF HAWAII

2013 JUL 31 AM 10:19

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

MEMORANDUM

DATE: July 26, 2013

TO: Duane Kanuha
Planning Director, County of Hawaii

FROM: Newton Inouye
District Environmental Health Program Chief

SUBJECT: Application: Variance – VAR 13-000154
Applicant: MERRILL KITTINGER
Owner: JOHN AND LINDA NYGREN
Request: Variance from Chapter 25, Zoning, Article 5, Division 7,
Section 25-5-76 Minimum Yards and Section 25-4-44(a),
Permitted Projections into Yards and Open Space
Requirements (Encroachment into the Southern Rear
Yard Setback)
Tax Map Key: 5-9-005:019, Lot 50-A

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