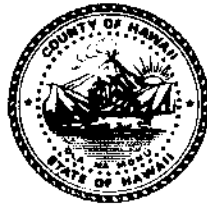


William P. Kenoi  
Mayor



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  
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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

February 25, 2015

Mr. Fernand Desilets  
75-5275 Māmalahoa Highway  
Holualoa, HI 96725

Dear Mr. Desilets:

**SUBJECT: Application: Variance - VAR 15-000268**  
**Applicant: FERNAND AND JOAN DESILETS**  
**Owner: FERNAND AND JOAN DESILETS**  
**Request: Variance from Chapter 25, Zoning, Article 5 Division 7,**  
**Section 25-5-76 Minimum Yards (Encroachment into**  
**Southeast Side Yard Setback)**  
**Tax Map Key: 7-5-001:026: Lot 1**

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The Planning Director certifies the **approval** of VAR-14-000268, subject to variance conditions. The variance will allow portion of the single-family dwelling with an 18.32 foot side (southeast) yard setback. These exceptions are in lieu of the required 20-foot side yard setback, as required by the Hawai'i County Code, Chapter 25, Zoning, Section 25-5-76, Minimum yards and Section 25-4-44 (a), Permitted projections into yards and open space requirements.

### **BACKGROUND AND FINDINGS**

1. **Location.** The subject property, consisting of approximately 1.868 acres of land, is situated at Moeauoa 2<sup>nd</sup>, District of North Kona, Hawai'i. The subject property's street address is 75-5275 Mamalahoa Highway.
2. **Zoning.** Agricultural – 1 acre (A-1a).
3. **State Land Use.** Agricultural.
4. **Required Setback.** 30 feet front and rear; 20 feet side yards.
5. **Variance Application-Site Plan.** The applicant submitted the variance application, attachments, and filing fee on January 8, 2015, 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, L.P.L.S., (Pattison Land Surveying, Inc.), and denotes the portions of the existing single family dwelling built into the side (southeast) yard setback.

The survey map shows a portion of the single-family residence encroaching 1.68 feet into the 20-foot side (southeast) yard setback.

6. **County Building Records.** Hawai'i County Real Property Tax Division records indicate that a building permit (08017) was issued on February 18, 1987, for the construction of a 3-bedroom and 2-bath single-family dwelling. The survey map shows the dwelling under consideration, and also shows a separate workshop/dwelling encroaching 4.52 feet to 5.61 feet into the side (southeast) yard setback. According to the Hawai'i County Real Property Tax Division, records indicate that the workshop/dwelling was built in 1953 under building permit 13576 issued on April 20, 1953, prior to the adoption of the Hawai'i County Zoning Code. Photos of the workshop/dwelling indicate that the structure is dilapidated and not fit for human habitation.
7. **Agency Comments and Requirements.**
  - a. The State Department of Health (DOH) memorandum, dated February 6, 2015.  
(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 the 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 January 20, 2015 and January 23, 2014, respectively. Notice of this application was published in the Hawai'i Tribune Herald and West Hawai'i Today on January 30, 2015.
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 20-foot side (southeast) yard setback as required by the Zoning Code.

The survey map prepared by Thomas G Pattison, L.P.L.S., of Pattison Land Surveying, Inc., shows that portion of the single-family residence encroaches 1.68 feet into the 20-foot side (southeast) yard setback.

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 in 1987 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.

The above special and unusual circumstances 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 subject 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 north side yard setback of the subject property include the following actions:

Remove the building encroachments and/or redesign the single-family dwelling to fit within the correct building envelope denoted on the recent survey map as prescribed by the Zoning Code. 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. 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 side yard setback, to consolidate the subject property which is owned by someone else and to re-subdivide the property to modify property lines and

adjust minimum side yard setbacks are not viable options; 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 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.

The encroachment of 1.68 feet into the side (north) yard setback still allows for adequate air circulation within the side yard setback.

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 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.

#### **PLANNING DIRECTOR'S DECISION AND VARIANCE CONDITIONS**

This variance request is **approved** subject to the following conditions. Based on the variance application's survey map, the single-family dwelling built upon the subject property ("LOT 1") will not meet the minimum side yard open space requirements pursuant to Hawai'i County Code, Chapter 25, (Zoning Code).

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 Hawai'i harmless from and against any loss, liability, claim, or demand for the property

Fernand Desilets  
75-5275 Māmalahoa Highway  
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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. Subject to provisions of the Zoning Code or State law, which may be changed from time to time, no permit shall be granted to allow an ohana or farm dwelling upon the subject property.
4. The dilapidated, uninhabited workshop/dwelling shall not be renovated to allow for a second dwelling, unless an Additional Farm Dwelling application is approved for the subject property (Lot 1).
5. Should the single-family dwelling 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-14-000268 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

Fernand Desilets  
75-5275 Māmalahoa Highway  
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February 25, 2015

DAVID Y. IGE  
GOVERNOR OF HAWAII



VIRGINIA PRESSLER, M.D.  
DIRECTOR OF HEALTH

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

2015 FEB 25 10:05 AM  
PLANNING DEPARTMENT

MEMORANDUM

DATE: February 6, 2015

TO: Duane Kanuha  
Planning Director, County of Hawaii

FROM: Newton Inouye ✎  
District Environmental Health Program Chief

SUBJECT: Application: Variance – VAR 15-000268  
Applicant: FERNAND AND JOAN DESILETS  
Owner: FERNAND AND JOAN DESILETS  
Request: Variance from Chapter 25, Zoning, Article 5, Division 7,  
Section 25-5-76, Minimum yards, and Section 25-4-44,  
Permitted Projections into Yards and Open Space  
Requirements (Encroachment into Side (Southeast) Yard  
Setback and Open Space Requirement.  
Tax Map Key: 7-5-001:026; Lot 1

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

