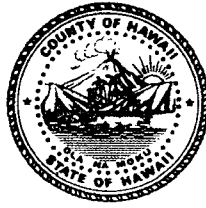


William P. Kenoi
Mayor



Duane Kanuha
Director

Bobby Command
Deputy Director

West Hawai'i Office
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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 12, 2015

Mr. Roger Fleenor, LPLS
P. O. Box 383414
Waikoloa, HI 96738

Dear Mr. Conventz:

SUBJECT: VARIANCE APPLICATION – VAR-15-000279

Applicant: ROGER FLEENOR, LPLS

Owners: KENNETH DAVISON & KIM DAVISON

Request: Variance from Chapter 25, Zoning, Article 5, Division 7, Section 25-5-76, Minimum Yards; Article 4, Division 4, Section 25-4-44(a), Permitted Projections into Yards and Open Space Requirements (Encroachment into the North Side Yard setback).

TMK: 7-3-012:037; Lot A-71

The Planning Director certifies the **approval** of Variance No. 15-000279, subject to variance conditions. The variance will allow portion of the 2-story Single-Family Dwelling to remain with a minimum 6.6-foot side (north) yard setback, in lieu of the required 8-foot side yard setback and associated roof eave projection resulting with a 2.8-foot side (north) side yard open space in lieu of the required 4-foot open space requirement. These exceptions are in lieu of the required 8-foot side yard setback and 4-foot side yard open space, as required by the Hawai'i County Code, Chapter 25, Zoning, Section 25-5-7, 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 8,058 square feet of land, is located in the Kona Highlands Subdivision and is situated at Kalaoa 1 & 2, North Kona, Hawai'i. The subject property's street address is 73-1180 Mahilani Drive.
2. **Zoning.** Agricultural – 5 acres (A-5a).
3. **State Land Use.** Agricultural.

4. **Required Setback.** Front & Rear – 15 feet; Sides – 8 feet.
5. **Variance Application-Site Plan.** The applicant submitted the variance application, attachments, and filing fee on March 13, 2015, and other submittals related to the variance request and variance application. The variance application's site plan, drawn to scale and prepared by Roger D. Fleenor, L.P.L.S., denotes the portions of the 2-story single-family dwelling built into the side (north) yard setback and associated side (north) yard open space.

The survey map shows that the 2-story single-family dwelling encroaches 1.4 feet into the 8-foot side (north) yard setback and 1.2 feet into the 4-foot side (north) yard open space.

The encroachment leaves a minimum 6.6-foot side (north) yard setback, in lieu of the required 8-foot side (north) yard setback and associated roof eave projection resulting with a 1.2-foot side (north) yard open space in lieu of the required 4-foot open space requirement.
6. **County Building Records.** Hawai'i County Real Property Tax Division records indicate that a building permit (02828) was issued on March 8, 1983, for the construction of a 2-bedroom and 1-bath single-family dwelling.
7. **Agency Comments and Requirements.**
 - a. The State Department of Health (DOH) memorandum, dated April 21, 2015.
(See attached memorandum)
 - b. No comments received from the Hawaii County Public Works Department-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 April 6, 2015. Notice of this application was published in the Hawai'i Tribune Herald and West Hawai'i Today on April 13, 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 survey map prepared by Roger D. Fleenor, L.P.L.S., shows that portion of the 2-story single-family dwelling encroaches 1.4 feet into the 8-foot side (north) yard setback and 1.2 feet into the 4-foot side (north) yard open space.

The encroachment leaves a minimum 6.6-foot side (north) yard setback, in lieu of the required 8-foot side (north) yard setback and associated roof eave projection resulting with a 1.2-foot side (north) side yard open space in lieu of the required 4-foot open space requirement.

No evidence has been found to allow indifference or premeditation by the owners or builders to deliberately create or intentionally allow the 2-story single-family dwelling encroachment problems to occur.

It appears that the 2-story single-family dwelling constructed nearly 37 years ago was constructed under valid building permits and other construction permits issued by the County. It also appears that past building permit inspections of the premises by the agencies during construction of the single-family dwelling 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 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 enclosed screened lanai encroachments constructed into the affected side (north) yard setback of the subject property include the following actions:

Remove the building encroachments and/or redesign or relocate the enclosed screened lanai constructed upon the subject property 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 2-story single-family dwelling was in compliance with all County requirements. Also, any structural or design correction of the single-family dwelling to meet setback requirement would leave unattractive reconstruction scars.

Because the encroachments are 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 rear 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.

No evidence has been found to show indifference or premeditation by the owners or builders to deliberately create or intentionally allow the building encroachment problems to occur.

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. The 2-story single-family dwelling has been in existence for approximately 37 years and was constructed under valid building permits and other construction permits issued by the County of Hawai'i. As such, it is felt that the issuance of this variance will not depreciate or detract from the character of the 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 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 no comments or objections were received from the surrounding property owners or general public in response to the Notification of Surrounding Properties Owners.

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

Based on the variance application's survey map, the two story single-family dwelling built upon

Roger Fleenor, LPLS
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the subject property (LOT A-71) will not meet the minimum rear yard setback and open space requirements pursuant to Hawai'i County Code, Chapter 25, (Zoning Code).

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 Hawai'i 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. 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 a ohana or farm dwelling upon the subject property.
4. Should the two-story 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.
5. 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-15-000279 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

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DAVID Y. IGE
GOVERNOR OF HAWAII



PLANNING DEPARTMENT VIRGINIA PRESSLER, M.D.
DIRECTOR OF HEALTH


2015 APR 22 PM 2:17

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

MEMORANDUM

DATE: April 21, 2015

TO: Mr. Duane Kanuha
Planning Director, County of Hawaii

FROM: Newton Inouye 
District Environmental Health Program Chief

SUBJECT: Application: Variance – VAR-15-000279
Applicant: ROGER D. FLEENOR, LPLS
Owner: KENNETH DAVISON & KIM DAVISON
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 (North) Yard Setback)
Tax Map Key: 7-3-012:037; Lot A-71

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

WORD: VAR 15-000279.ni

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