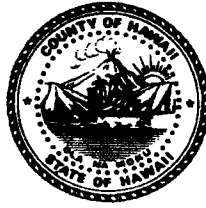


William P. Kenoi
Mayor



Duane Kanuha
Director

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County of Hawai'i
PLANNING DEPARTMENT

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September 12, 2016

Mr. Sidney Fuke, Planning Consultant
100 Pauahi Street, Suite 212
Hilo, HI 96720

Dear Mr. Fuke:

SUBJECT: Application: Variance - VAR 16-000378
Applicant: Sidney Fuke, Planning Consultant
Owners: Janet Rugg Lew & Mark Bernard Lew
Request: Variance from Chapter 25, Zoning, Article 4, Division 4, Section 25-4-43(c). Fences and Accessory Structures, and Article 5, Division 1, Section 25-5-7, Minimum Yards Requirements (Setback for Rock Wall Over Six Feet Tall With Encroachment into Southwest Front Yard Setback and Southeast Side Yard Setback)

Tax Map Key: 1-4-027:011; Lot 1-A

After reviewing your variance application, the Planning Director certifies the **approval** of Variance 16-000378 (VAR 16-000378), subject to conditions. The variance allows for portion of the existing rock wall to remain along the side (southeast) boundary with a height of 8 feet to remain with a minimum 1-foot side yard setback and associated side yard open space from the side boundary line. This allowance is in lieu of the required minimum 10-foot side yard setback and 5-foot side yard open space requirement. It will also allow for the five Pilasters (pillars) ranging in height from 6'-10" to 7'-11" to remain with a minimum 1-foot front (southwest) yard setback and associated front (southwest) yard open space. The variance is from the subject property's minimum side (southeast) yard setback and front (southeast) yard setback requirement pursuant to the Hawai'i County Code, 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.

BACKGROUND AND FINDINGS

1. **Location.** The subject property contains approximately 41,219 square feet and is situated within the Kapoho Beach Lots Subdivision, South Hilo, Hawai'i. The subject property's street address is 14-5113 Alapai Point Road.

2. **County Zoning.** Agricultural – Single-Family Residential – 10,000 sq. ft. (RS-10).
3. **State Land Use Designation.** Urban.
4. **Setback Requirements.** 20 feet for front and rear; 10 feet for sides.
5. **Variance Application.** The applicant/owner submitted the variance application attachments, filing fee, and associated materials on June 20, 2016. The variance application's site plan map was prepared by the owner/applicant. The variance site plan, undated, denotes the placement of the rock wall into the minimum 20-foot front yard setback and side yard setback. The request affects southwest front yard setback and southeast side yard setback. (See Exhibit A)

The variance allows for portion of the existing rock wall to remain along the side (southeast) boundary, with a height of 8 feet, with a minimum 1-foot side yard setback and associated side yard open space, from the side boundary line. This allowance is in lieu of the required minimum 10-foot side yard setback and 5-foot side yard open space requirement. It will also allow for the five pilasters (pillars) ranging in height from 6'-10" to 7'-11" to remain with a minimum 1-foot front (southwest) front yard setback and associated front (southwest) yard open space.

6. **County Building Records.** Hawai'i County Real Property Tax Office records indicate that a building permit (BH2016-00237) was issued on February 19, 2016 for the subject property of a single-family dwelling consisting of five bedrooms, five full baths, two half-baths, living room, kitchen, dining area, and carport.
7. **Special Management Area.** The subject property is located within the Special Management (SMA). Special Management Area Minor Use Permit Assessment No. 14-001184 (SAA 14 001184) was issued on March 3, 2015 to allow the establishment of a single-family dwelling, inclusive of carport, installation of a septic system and leach field, construction of a perimeter rock wall, and installation of an in-ground swimming pool.
8. **Agency Comments and Requirements.**
 - a. State Department of Health (DOH) memorandum dated July 13, 2016. "The Health Department found no environmental health concerns with regulatory implications in the submittals."
 - b. No comments received from the Department of Public Works Building Division.
9. **Public Notice.** The applicant filed a transmittal letter with copy of the notices sent to surrounding property owners via USPS. According to USPS certificate of mailing receipts

and affixed postal receipts, the first and second notices were mailed on July 18, 2016 and July 20, 2016, respectively. Notice of this application was published in the Hawai'i Tribune Herald and West Hawai'i Today on August 4, 2016.

10. **Posted Sign.** The applicant submitted an affidavit, dated August 2, 2016, regarding sign posting on the subject property and photograph of the posted sign.
11. **Comments from Surrounding Property Owners or Public.**
 - a. Objection e-mail letter received on July 26, 2016 from Jeana Kerr.
 - b. Objection e-mail letter received on July 26, 2016 from Martha Kekula (Kula) Sunn.
 - c. Objection letter received on August 1, 2016 from Dr. Maya Baylac, N.D.
 - d. Support letter received on August 1, 2016 from David J. Schmid and Victoria A. Blower.
12. **Time Extension.** The applicant's variance application was acknowledged by letter dated July 26, 2016 and additional time to review the application was required. The applicant granted the Planning Director an extension of time for decision on the Variance Application to September 12, 2016.

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 criterion (a) for the following reasons:

The owner submitted the variance application to allow a portion the existing rock wall to remain along the side (southeast) boundary with a height of 8 feet with a minimum 1-foot side yard setback and associated side yard open space from the side boundary line. This allowance is in lieu of the required minimum 10-foot side yard setback and 5-foot side yard open space requirement. It will also allow for the five pilasters (pillars) to remain with a minimum 1-foot front (southwest) front yard setback and associated front (southwest) yard open space.

The owners constructed a rock wall for security and privacy reasons, which averages 6 feet in height along the southeast boundary as well along the property's frontage.

The Hawai'i County Code, Chapter 25, (Zoning Code), Section 25-4-43, Fences and accessory structures, (a) states: *A perimeter boundary fence, wall or similar feature, six feet or less in height shall not be considered a structure and shall be permitted without any front, side or rear yard requirements. In addition, a fence is constructed of strand material, such as barbed wire, hog wire, or chin link, which allows "see-through" visibility is permitted as a height of eight feet without any front, side, or rear yard requirements.*

The applicant has stated in its background report that due to the topography of the subject property, the first 50+ feet of the side (southeast) rock wall approaches nearly eight (8) feet in height, while the remaining length of the rock wall is less than 6 feet in height. There is no rock wall along the north side boundary as well as the shoreline.

Along the property's frontage, there is a 15-foot wide gate with a decorative, see-through metal piece above the gate that approaches nearly 8 feet in height. The applicant has stated that to break the visual monotony of the rock wall fronting the property, approximately 18-inch square pilasters (pillars) rise above the less than 6-foot tall rock wall.

Requiring the owner to meet this setback requirement of a 10-foot side yard setback and 20-foot front yard setback would greatly diminish the overall functionality of the subject property and would remove a large portion of the property from being usable.

Therefore, based on the information stated above, there is special and unusual circumstance that exists which supports this variance application.

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 fencing encroachments to be constructed into the affected side and front yard of the subject property include the following actions:

The walls have already been constructed. As the applicant has stated, there are no reasonable alternatives available that would resolve the encroachment issue. The alternative of the removal of the side (southeast) rock wall or shaving off the portion of the rock wall that rises approximately 2 feet above the side (southeast) yard rock wall is not practicable, especially when length of the area that rises above the 6-foot height requirement is less than 25 percent of the total length of the rock wall. As the applicant has stated, lowering of the height in this area would not enable the applicants to achieve the desired level of privacy from the neighboring property due to the topographic differences between the properties. This can be validated by the fact the adjacent

property owner most affected by the side yard rock wall supports the approval of this variance because it provides privacy between these two properties.

The front yard rock wall does not exceed the 6 feet height limit; however, the five (5) pilasters (pillars) extend 10 inches to 1 foot and 11 inches above the 6 feet height limit. Removal of these pilasters (pillars) would create an unattractive, monotonous-looking wall.

Also, as mentioned earlier, requiring the owner to meet this setback requirement of a 10-foot side yard setback and 20-foot front yard setback would greatly diminish the overall functionality of the subject property and would remove a large portion of the property from being usable.

Therefore, there are no reasonable alternatives to resolve the difficulty.

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 criterion (c) for the following reasons:

The intent and purpose of requiring building setbacks for a lot are to assure that adequate air circulation and exposure to light are available between permitted structure(s)/uses and boundary/property lines.

Letters and e-mails objecting to the variance request were received from Jeana Kerr, Martha Kekula (Kula) Sunn and Dr. Maya Nicole, respectively.

All three objections to the variance cited the obstruction of view, the acquisition of land through the approval of this variance and denial of access to the ocean as their main concern.

As mentioned earlier, a perimeter boundary fence, wall or similar feature, six feet or less in height shall not be considered a structure and shall be permitted without any front, side or rear yard requirements. In addition, a fence constructed of strand material, such as barbed wire, hog wire, or chin link, which allows "see-through" visibility, is permitted as a height of eight feet without any front, side, or rear yard requirements.

One of the concerns from those objecting to the variance was the obstruction of view. The rock wall along the southeast side yard boundary is basically 6 feet in height, except for approximately 25 percent of the wall which rises approximately 2 feet above the required height limit. This wall basically affects the adjacent side yard owner, who is in favor of the variance because it provides

privacy between the two (2) properties. The front yard rock wall does not exceed the 6 feet height limit; however, the five (5) pilasters (pillars) extends 10 inches to 1 foot and 11 inches above the 6 feet height limit.

Even if the rock walls were setback to meet this setback requirement of a 10-foot side yard setback and 20-foot front yard setback, there would be no change in the view. It should also be noted that the two-story, single-family dwelling being constructed on the subject property has a height of 27 feet which is approximately 9 to 10 feet higher than the rock walls and the 5 pilasters (pillars). The height limit for a single-family dwelling in the residential district is thirty-five (35) feet. Therefore, the permitted two-story, single-family dwelling would have a much more impact on the view plane than the rock walls.

This variance does not provide the owners the right to acquire additional land. Further, all improvements shall be constructed on the subject property. The variance only allows for the rock wall along the side (southeast) yard and the rock wall along the frontage with the pilasters (pillars) to remain on the subject property with a one-foot front and side yard setback. No additional land shall be acquired from the roadway lot or the adjacent side yard property.

The rock walls will not impede any access to the shoreline or to the ocean. In fact, there are no rock walls along the north side boundary as well as along the shoreline (makai property boundary). Condition 8 of the Special Management Area Use Permit Assessment Application (SAA 14-1184) states: "*Neither the landowner nor any agent of the landowner or its successors, shall, at any time, impede or otherwise restrict public access on or makai of the proposed shoreline, as surveyed on September 7, 2014.*" It should be noted that there is also a 5-foot pedestrian walkway within the subdivision that runs mauka/makai which provide access to the shoreline. Therefore, the variance will not impede any access to the shoreline.

Based on the foregoing findings, the approval of this application 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 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.

PLANNING DIRECTOR'S DECISION AND VARIANCE CONDITIONS

Based on the variance application site plan, the rock wall built upon the subject property ("LOT 1-A") will not meet the minimum front and side yard requirement pursuant to Hawai'i County Code, Chapter 25, (Zoning Code), according to the variance application's survey map.

1. The applicant/owner, their assigns or successors shall be responsible for complying with all stated conditions of approval.

Sidney Fuke, Planning Consultant

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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. Applicant, its successors or assigns, shall comply with all stated conditions of approval Special Management (SMA). Special Management Area Minor Use Permit Assessment No. 14-001184 (SAA 14-001184).
4. Should the rock walls built on the subject property be destroyed by 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 building occupancy.
6. Applicant shall apply for a Building Permit for the after-the-fact constructed wall within three (3) months from the effective date of this variance.

Should any of the foregoing variance conditions not be complied with, the Planning Director may initiate proceedings to null and void Variance-16-000378.

Sincerely,



DUANE KANUHA
Planning Director

LHN:nci

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xc: Real Property Tax Office (Hilo)
Gilbert Bailado, GIS (via email)