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October 23, 2017

David Barclay
Brian Yahata
P. O. Box 537
Hawi, Hawaii 96719

Dear Mr. Barclay & Mr. Yahata:

SUBJECT: Application: Variance - VAR 17-000432
Applicant: DAVID BARCLAY/BRIAN YAHATA
Owner: HUB WELL GARDENS LLC
Request: Variance from Chapter 25, Zoning, Article 5 Division 1,
Section 25-5-7 Minimum Yards.
(Encroachment into East Side Yard Setback)
Tax Map Key: 5-5-010:022

The Planning Director certifies the **approval** of Variance No. 17-000432, subject to conditions. The variance will allow portion of the "as-built cottage" to remain with a minimum 8.56-foot side (east) yard setback. These exceptions are in lieu of the required 10-foot side yard setback as required by the Hawai'i County Code, Chapter 25, Zoning, Section 25-5-10, Minimum yards and Section 25-4-44 (a).

BACKGROUND AND FINDINGS

1. **Location.** The subject property, consisting of approximately 1.985 acres (86,466.6 sq. ft.) of land, is situated at Hawi, North Kohala, Hawai'i. The subject property's street address is 55-529 Hua Lane.
2. **Zoning.** Single-Family Residential- 15,000 square feet (RS-15).
3. **State Land Use.** Urban.
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 23, 2017, and other submittals related to the variance request and variance application. The variance application's site plan, drawn to scale and

prepared by DKS Drafting, denotes the portion of the “as-built” cottage built into the side (east) yard setback. **(See attached site map – Exhibit A)**

The site plan shows that portion of the “as-built” cottage encroaches 1.44 feet into the 10-foot side (east) yard setback. Based on this encroachment, the “as-built” cottage remains with a minimum 8.56-foot side (east) yard setback.

6. **County Building Records.** The Hawai‘i County Real Property Tax Office does not reveal any building permit for the “as-built” cottage; however, an electrical permit (2006-0499K) was issued on April 11, 2006 and finalized on June 27, 2017 for new alteration (service upgrade).
7. **Agency Comments and Requirements.**
 - a. State Department of Health (DOH) memorandum dated July 7, 2017: *“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. (Kona)
8. **Notice to Surrounding Property Owners.** The applicant submitted a copy of notices mailed to surrounding property owners (including affidavits) by USPS. According to these submittals, the first and second notices were mailed on June 22, 2017 and July 23, 2017, respectively. Notice of this application was published in the Hawai‘i Tribune Herald and West Hawai‘i Today on July 19, 2017.
9. **Time Extension.** The applicant’s variance application was acknowledged by letter dated July 8, 2017 and additional time to review the application were required. The applicant granted the Planning Director an extension of time for decision on the Variance Application to October 31, 2017.
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 applicant submitted the variance application to address or resolve the encroachment of the “as-built” cottage constructed into the 10-foot east side yard setback.

The current owners purchased the property in December 2014 and was not informed or made aware of any encroachment violation on the subject property. The applicant has stated that the “as-built” cottage was constructed sometime between 1967 and 1970. Although, the Hawai‘i County Real Property Tax Office Records do not reveal any building permit being issued for the “as-built” cottage, Tax Office records reflect that an electrical permit (E2006-0499K) was issued for new alteration (service upgrade) and finalized on June 27, 2006. Therefore, it can be determined that there was a structure in existence since 2006, nearly 11 years ago.

The above special and unusual circumstances determine the owner was not at fault in creating the encroachment violation and was not informed of any encroachment issues at the time of purchase. Therefore, requiring the current owners to remove or relocate the “as-built” cottage outside of the setback, would have the current owners incur additional cost.

(b) There are no other reasonable alternatives that would resolve the difficulty.

The variance application meets criteria (b) for the following reasons:

Alternatives available to the current owners to correct and/or address the “as-built” cottage encroachment constructed into the affected side yard setback of the subject property include the following actions:

Remove the building encroachments and/or redesign the as-built, single-family dwelling to fit within the correct building envelope denoted on the recent site plan as prescribed by the Zoning Code. The “as-built” cottage is built on concrete slab; therefore, to require the owner to relocate the “as-built” cottage would involve the owner to do major excavation to his property by having to replace and move existing water lines and electrical wirings. The portion of the “as-built” cottage encroaching into the setback area is the kitchen and bathroom area: to have the current owners to remove portion of the “as-built”, cottage would leave unattractive reconstruction scars and diminish the overall functionality of the cottage.

Because the encroachments are within the side yard setback, one alternative would be to consolidate the subject property with the adjoining side property and resubdivide the property to modify property lines and adjust minimum side yard setbacks. Although both properties are owned by the same owners, the cottages on both properties are situated close to the common boundary line as evidenced by the attached photo (**See Exhibit B**). To consolidate and resubdivide both properties to modify property lines and adjust minimum side yard setback would only shift the side yard setback encroachment from the subject property to the adjacent

side yard parcel. Both of these alternatives are not practical. Therefore, there are no reasonable alternatives to resolve the difficulty.

(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 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.

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 approximately 11 years since the two-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 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.

PLANNING DIRECTOR'S DECISION AND VARIANCE CONDITIONS

Based on the variance application's site plan, the "as-built" cottage constructed on the subject property (TMK: 5-5-010:022), will not meet the minimum side yard setback requirements pursuant to Hawai'i County Code, Chapter 25 (Zoning).

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.

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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. The approval of this variance permits "as-built" cottage to remain upon the subject property in accordance with the variance application site plan.
4. The applicant/owner(s) shall apply for building permit for the 'as-built" cottage within 90 days from the date of this variance.
5. Should the "as-built" cottage 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-17-000432 null and void.

Sincerely,



MICHAEL YEE
Planning Director

LHN:nci

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Encl: Exhibits A-B

cc: Planning Department-Kona
Real Property Tax Division-Kona
Gilbert Bailado, GIS (via email)

EXHIBIT

B

