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PLANNING DEPARTMENT

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April 5, 2018

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

Dear Mr. Fleenor:

**SUBJECT: Variance - VAR 17-000446**  
**Applicant: ROGER D. FLEENOR, LPLS**  
**Owners: Jeffrey Noll**  
**Jennifer Whitley**  
**Shelley Kreutzmann**  
**Request: Variance from Chapter 25, Zoning, Article 5, Division 1,**  
**Section 25-5-76, Minimum Yards Requirements**  
**(Encroachment into West Front Yard Setback, North Side**  
**Yard Setback and East Rear Yard Setback)**  
**Tax Map Key: 5-5-002:087; Lot B (Unit 1 and Unit 2)**

The Planning Director certifies the **approval, in part for**, Variance No. 17-000446, subject to variance conditions. The variance will allow portions of the two dwellings (dwelling "B" on Unit 1 and dwelling "E" on Unit 2) as shown on the site plan to remain. Dwelling "B" is allowed to remain with a minimum 7.0-foot side (north) yard and 4.9-foot open space in lieu of the required 20-foot side yard setback and 14-foot open space and is allowed to remain with a minimum 8.9-foot side (east) yard setback and 6.8-foot open space, in lieu of the required 20-foot side (east) yard setback. Dwelling "E" is allowed to remain with a minimum 8.0-foot, 9.8-foot, 8.4-foot, and 13.0-foot rear (east) yard setback and 5.2-foot, 6.1-foot, 7.9-foot, 6.5-foot and 12.0-foot open space, in lieu of the required 30-foot rear yard setback and required 24-foot open space. These exceptions are in lieu of the required 20-foot side yard and 30-foot rear yard setback, as required by the Hawai'i County Code, Chapter 25, Zoning, Section 25-5-76, Minimum yards requirements.

The variance does not allow dwelling "A" on Unit 1 to remain with a minimum 11.7-foot and 13.1-foot front (west) yard and setback and 11.2-foot and 12.6-foot open space in lieu of the required 30-foot front yard setback 24-foot open space, whereby the variance request is **denied**.

## **BACKGROUND AND FINDINGS**

1. **Location.** The subject property, Lot B, contains approximately 3.957 acres and is situated within a Por. Kaauhuhu Homesteads, North Kohala, Hawai'i. The subject property's street address is 55-733 Kahei Road, Unit 1 and 2, Hawi, HI. 96719.
2. **Owners.** Unit 1 is owned by Jeffrey Noll and Jennifer Whitley. Unit 2 is owned by Shelly Kreutzmann.
3. **County Zoning.** Agricultural – 20 acres (A-20).
4. **State Land Use Designation.** Agricultural.
5. **Setback Requirements.** 30 feet front & rear and 20 feet for sides.
6. **Variance Application.** The applicant/owner submitted the variance application, attachments, filing fee, and associated materials on September 27, 2017. The variance application's survey map dated August 30, 2017 was prepared by Roger D. Fleenor, LPLS and denotes that portions of the dwelling walls are built into the front (West) and (North) yard setbacks and side (East) yard setback. **(See Exhibit A-Site Plan)**

The survey map dated August 30, 2017 shows sections of the dwelling walls and roofs into the yard setbacks and roofs into open spaces. Dwelling "A" has a minimum 11.7-foot encroachment and 13.1-foot front (West) yard and setback and 11.2-foot and 12.6-foot open space in lieu of the required 30-foot front yard setback 24-foot open space. Dwelling "B" has a minimum 7.0-foot side (north) yard setback and 4.9-foot open space and 8.9-foot side (east) yard and 6.8-foot open space, in lieu of the required 20-foot side yard setback and 14-foot open space. Dwelling "E" has a minimum 8-foot side (east) rear yard and 5.2-foot open space, in lieu of the required 30-foot rear yard setback 24-foot open space

7. **County Building Records.** Hawai'i County Real Property Tax (RPT) Office records indicate that Dwelling "B" has a building permit (B2009-0118K) that was issued for an "as built" upper level addition: 1 bedroom, 1 bath, kitchen, dining room, laundry with gas water heater, storage closet, screened in deck & interior & exterior stairs, lower level addition: art studio and office. The original part of Dwelling "B" that was added onto, was built in 1944 per RPT records, with an effective built date of 1955.
8. **Real Property Tax Records:** The Real Property Tax (RPT) Historical Field Books show that an efficiency dwelling and carport existed on Unit 2 as of year 2000 and that a dwelling and storage building existed on Unit 1 as of 1996. The RPT website further states the Dwelling "B" on Unit 1 was built in 1944. No information was provided on the structure identified as dwelling "A" on the survey map.

9. **Non Dwellings within Yards and Open Space:** Building “C”, a storage building and carport, Building “D” a tank are located in the yard and open space. Records show that they were built in 1960 and are considered legally non-conforming since both were built before September 21, 1966.
10. **Additional Farm Dwelling Agreement:** Dwelling “E” was approved as an additional farm dwelling per Additional Farm Dwelling Agreement dated August 21, 2009. The Additional Farm Dwelling Agreement is required to be recorded with the Bureau of Conveyances, and a copy of the recorded Agreement is required to be provided to the Planning Department prior to the approval of the building permit for the farm dwelling. In addition, the applicant is responsible for all of the stated conditions of approval of the Additional Farm Dwelling Agreement for the farm dwelling. (Copy attached).
11. **Agency Comments and Requirements.**
  - a. State Department of Health (DOH) memorandum dated May 2, 2016. “The Health Department found no environmental health concerns with regulatory implications in the submittals.”
  - b. Department of Public Works (DPW) - Building Division email dated December 4, 2017: “For TMK: 5-5-002-087-0000 it appears per our records that not all the structures have Building, Electrical and/or Plumbing Permit, and obtaining the respective permits would be a requirements that shall be addressed with any application for this property.”
12. **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 October 2, 2017 and October 27, 2017, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on October 5, 2017.
13. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. No written comments or objections from surrounding property owners or the general public were received.
14. **Time Extension.** The applicant’s variance application was acknowledged by letters dated October 26, 2017, December 22, 2017, and January 22, 2018.

#### **GROUND FOR APPROVING VARIANCE, IN PART, FOR VAR-17-000446**

##### **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 dwelling “B” and dwelling “E” for the following reasons:**

The owner/applicant submitted the variance application to address or resolve the encroachment of the dwelling walls into the 30-foot front (west) yard setback, 20-foot side yard setback and 30-foot rear yard setback, as required by the Zoning Code.

The survey map dated August 30, 2017 shows sections of the dwelling walls encroaching: For Dwelling “A” the encroachments leaves a minimum 11.2-foot front (west) yard setback and open space in lieu of the required 30-foot front yard setback 24-foot open space. For Dwelling “B” the encroachments leave a minimum 7.0 foot side (north) yard setback and 4.9-foot open space, in lieu of the required 20-foot side (north) yard setback and 14-foot open space, and 8.9-foot side (east) yard setback and 6.8-foot open space, in lieu of the required 20-foot (east) side yard setback and 14-foot open space. For Dwelling “E” the encroachment leaves a minimum 8.0-foot rear (east) yard setback and 5.2-foot open space, in in lieu of the required 30-foot rear yard setback and required 24-foot 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 “as-built” Dwelling “B” improvements were constructed in 2009, were done under building permit issued by the County for the existing single-family dwelling and closed under valid building permit inspections. It also appears that past building permit inspections of the premises by the affected agencies during construction of the Dwelling “B” improvements did not result in any determination or citation that there were any use issues, building encroachment issues or building setback irregularities at that time, specifically for Dwelling “A”, Dwelling “B” and Dwelling “E”.

The north and east boundaries of the property are bounded the 40-foot wide Kohala ditch right-of-way which provides a natural buffer between adjoining properties and thereby reduces the impacts from the encroachments of Dwelling “B and Dwelling “E”, located more than 40-feet from the adjoining properties.

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 best use and development of the subject property.

**Alternatives**

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

**The Variance application meets criterion (b) for dwelling “B” and dwelling “E” for the following reasons:**

Alternatives available to the current owners to correct and/or address the building encroachments constructed into the affected side yard of the subject property include the following actions:

Remove the building encroachments and/or redesign the dwelling denoted on the survey map to fit within the correct building envelope as prescribed by the Zoning Code. This alternative would be deemed unreasonable for Dwelling "B" and Dwelling "E", especially when the owners complied with the building permit process and were under the impression that the single-family dwellings were 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.

Therefore, there are no reasonable alternatives to resolve the encroachment issue for dwelling "B" and dwelling "E" as shown on Exhibit "A".

### **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 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 zoning 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.

No evidence has been found to show indifference or premeditation by the owners or builders of Dwelling "B", and Dwelling "E" 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. Dwelling "B" has been in existence for approximately 25 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. Dwelling "E" is estimated to be built in Year 2000 as a lean to storage/economy dwelling per RPT Historical Field Book records, with no record of a building permit.

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.

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.

Therefore, the variance would be consistent with the general purpose of the zoning district and not be materially detrimental to the public's welfare or cause substantial adverse impact to the area's character or to adjoining properties.

### **GROUND FOR DENYING VARIANCE, IN PART, FOR VAR-17-000446**

#### **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.*

There are no special or unusual circumstance applying to the subject property which interferes with the best use of the property. Unit 1 comprises 1.641 acres to provide enough area for structures identified as Dwelling "A" and "B" and associated accessory structures.

There are no Planning Department approvals to allow Dwelling "A" as a third dwelling on the subject parcel and there was no building permit obtained for the structure. The structure identified as Dwelling "A" has been used for either a dwelling or for a storage building since Year 2009, when it was shown on a site plan for a building permit (B2009-0118K), for an "as-built" addition to Dwelling "B" as a storage building.

#### **Alternatives**

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

**The Variance application does not meet criterion (b) for dwelling "A" for the following reasons:**

Dwelling "A" was built as post and pier construction entirely within the front yard setback without first obtaining a building permit or approval for a third dwelling. The alternative is to remove the building encroachments to fit within the correct building envelope; obtain a building permit and change and convert it to a storage building or to a guest house on Unit 1.

#### **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 welfare or cause substantial, adverse impact to an area's character or to adjoining properties.*

The current encroachment of Dwelling "A" is consistent with the intent and purpose of this chapter, and the general plan, in that it still provides for air, light and circulation, in that the encroachment leaves a minimum 11.2-foot front (west) yard setback.

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

Based on the variance application's survey map, the single-family dwelling built on the subject property ("LOT B") will not meet the minimum front and side yard requirements pursuant to Hawai'i County Code, Chapter 25, (Zoning Code).

This variance application is approved subject to the following variance 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. Should the dwelling walls built 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.
4. An Ohana Dwelling permit shall not be approved for the subject property, subject to the provisions of the Hawai'i County Code, Chapter 25, (Zoning) or state law, which may change from time to time.
5. The applicant/owner(s), successors or assigns shall relocate or remove the structure identified as dwelling "A" on the survey map (Exhibit "A") to fit within the correct building envelope as prescribed by the Zoning Code for the subject parcel within one year from the effective date of Variance-17-000446.
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 building occupancy.
7. Building permits shall be obtained for structures identified on Exhibit "A" as Dwelling "A", and Dwelling "E" and carport on Unit 2, and any other existing structures requiring a building permit, and move Dwelling "A" out of the minimum front yard setback and obtain an Additional Farm Dwelling Agreement, within one year from the effective date of Variance-17-000446.

8. Applicant will apply for and obtain an Additional Farm Dwelling Agreement for Dwelling "A" prior to obtaining a Building Permit for Dwelling "A" or convert to storage building or guest house.
9. The applicant, its successors or assigns is responsible for all stated conditions of approval for Additional Farm Dwelling Agreement (AFDA) approved on August 21, 2009.

Should any of the foregoing variance conditions not be complied with, the Planning Director may initiate proceedings to null and void Variance-17-000446.

Sincerely,



MICHAEL YEE  
Planning Director

RJN: rjn

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cc: w/Attachment: AFDA dated August 21, 2000

Mr. Jeffrey Noll  
Ms. Jennifer Whitley  
P.O. Box 190562  
Hawi, HI 96719-0541

Ms. Shelley G. Kreutzmann  
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Hawi, HI 96719-0247

xc: w/o attachment:

DPW Building Division  
DPW Engineering Division  
Real Property Tax Office (Kona)  
Gilbert Bailado, GIS