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County of Hawai'i PLANNING DEPARTMENT

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September 26, 2018

Zendo Kern
Zendo Kern Planning Consultant
194 Wiwoole Street
Hilo, HI 96720

Dear Mr. Kern:

SUBJECT: Application: Variance - VAR 18-000488
Applicant: ZENDO KERN
Owners: MICHAEL JONES
REBECCA JONES
Request: Variance from Chapter 25, Zoning, Article 5, Division 1,
Section 25-5-7, Minimum Yards Requirements
(Encroachments into Southeast Rear Yard Setback, North
Side Yard Setback, and South Side Yard Setback)
Tax Map Key: 7-7-019:050 Lot 50-A

NOTE: County of Hawai'i Planning Department was notified by Mr. Zendo Kern, applicant, that Ownership of TMK: (3) 7-7-019:050 was changed on June 5, 2018, from Mr. John McCarron and Ms. Carmel McCarron to Mr. Michael Jones and Ms. Rebecca Jones, and the Warranty Deed was recorded with the Bureau of Conveyance on June 15, 2018, Doc. No. A-67400326.

The Planning Director certifies the **approval** of Variance No. 18-000488, subject to variance conditions. The variance will allow portions of the single-family dwelling to remain "as-built" with a minimum 17.07 (southeast) rear yard setback, a minimum 9.8 and 9.6 (north) side yard setbacks and 7.28 (south) side yard setback, in lieu of the required 20-foot rear yard setback and 10-foot side yard setbacks, as required by the Hawai'i County Code, Chapter 25, Zoning, Section 25-5 7, Minimum yards requirements.

BACKGROUND AND FINDINGS

1. **Location.** The subject property, Lot 50-A, contains approximately 13,202 square feet and is situated within the "Kuakini Heights Subdivision", Unit II, Kapalaalaea I, North Kona, Hawai'i. The subject property's street address is 77-353 Koana Way Kailua-Kona, HI 96704.

2. **County Zoning.** Single-Family Residential (RS-10).
3. **State Land Use Designation.** “Urban”.
4. **Setback Requirements.** 20 feet for fronts and 10 feet for sides.
5. **Variance Application.** The applicant/owner submitted the variance application, attachments, filing fee, and associated materials on July 3, 2018. The variance application’s survey map dated May 22, 2018 was prepared by Thomas G. Pattison, LPLS and denotes that portions of the dwelling walls are built into the (southeast) rear yard setback, and (north) side yard and (south) side yard setback, in lieu of the required 20-foot rear yard setback and 10-foot side yard setbacks, as required by the Hawai‘i County Code, Chapter 25, Zoning, Section 25-5 7, Minimum yards requirements. **(See Exhibit A-Site Plan)**

The survey map dated May 22, 2018 shows sections of the single-family dwelling with a minimum 17.07 (southeast) rear yard setback, a minimum 9.8 and 9.6 (north) side yard setbacks and 7.28 (south) side yard setback, in lieu of the required 20-foot rear yard setback and 10-foot side yard setbacks.

6. **County Building Records.** Hawai‘i County Real Property Tax Office records indicate that a building permit (#24) was issued on August 23, 1972 for a single-family dwelling consisting of 3 bedroom, 2-bath, and garage, and building permit (#926) was issued on July 19, 1974 for an addition.
7. **Agency Comments and Requirements.**
 - a. State Department of Health (DOH) memorandum dated August 13 2018. “The Health Department found no environmental health concerns with regulatory implications in the submittals.”
 - b. No comments were received from Department of Public Works - Building Division as of this date.
8. **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 25, 2018 and August 2, 2018, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on July 27, 2018.
9. **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.
10. **Time Extension.** The applicant’s variance application was acknowledged by email dated September 25, 2018.

GROUNDS 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/applicant submitted the variance application to address or resolve the encroachment of the dwelling walls into the 17.07 (southeast) rear yard setback, a minimum 9.8 and 9.6 (north) side yard setbacks and 7.28 (south) side yard setback, in lieu of the required 20-foot rear yard setback and 10-foot side yard setbacks as required by the Zoning Code.

The survey map dated May 22, 2018 shows sections of the single-family dwelling with a minimum 17.07 (southeast) rear yard setback, a minimum 9.8 and 9.6 (north) side yard setbacks and 7.28 (south) side yard setback, in lieu of the required 20-foot rear yard setback and 10-foot side yard setbacks.

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 1973, with improvements sometime after 1978, since Subdivision Map no. 4222, approved on November 17, 1978, nearly 30 years ago, did not show an projections in to the rear yard setback, and subsequent construction permits were 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 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 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 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, 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.

There are no reasonable alternatives to resolve the encroachment issue.

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 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 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 dwelling has been in existence for approximately 30 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.

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.

PLANNING DIRECTOR'S DECISION AND VARIANCE CONDITIONS

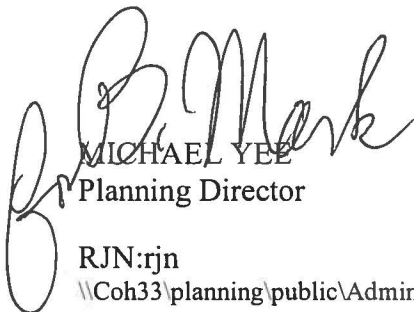
Based on the variance application's survey map, the single-family dwelling built on the subject property ("LOT 50-A") will not meet the minimum side yard requirements pursuant to Hawai'i County Code, Chapter 25, (Zoning Code).

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. 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.

Should any of the foregoing variance conditions not be complied with, the Planning Director may initiate proceedings to null and void Variance-16-000474.

Sincerely,



MICHAEL YEE
Planning Director

RJN:rjn

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Mr. Zendo Kern
September 26, 2018
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xc: Natalie Whitworth, DPW Engineering Division
Real Property Tax Office (Kona)
Gilbert Bailado, GIS

Michael Jones
Rebecca Jones
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Renton, WA 98056