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Mayor



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Director

Daryn Arai  
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**County of Hawai'i**  
PLANNING DEPARTMENT

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September 28, 2018

Zendo Kern  
Planning Consultant  
194 Wiwoole Street  
Hilo, HI 96720

Dear Mr. Kern:

**SUBJECT: Application: Variance - VAR 18-000490**  
**Applicant: ZENDO KERN**  
**Owner: RUSSELL W. GRANT SR. AND JOCELYN L. GRANT**  
**Variance from Chapter 25, Zoning, Article 5, Division 1,**  
**Section 25-5-7, Minimum Yards, and Section 25-4-44,**  
**Permitted Projections into Yards and Open Space**  
**Requirements (Encroachment into East Rear Yard Setback)**  
**Tax Map Key: 2-4-061:077; Lot 68**

The Planning Director certifies the **approval** of Variance No. 18-000490, subject to conditions. The variance will allow portion of this single-family dwelling to remain with a minimum 12.01-foot rear (east) yard and associated roof eave projection resulting with a 9.38-foot rear (east) yard open space. These exceptions are in lieu of the required 20-foot rear yard setback and 14-foot rear yard open space as required by the Hawai'i County Code, Chapter 25, Zoning, Section 25-5-76, Minimum yards and Section 25-4-44 (a), Permitted projections into yards and open space requirements.

**BACKGROUND AND FINDINGS**

1. **Location.** The subject property contains approximately 10,428 square feet and is situated in Waiākea, the Maunakai Circle Subdivision, South Hilo, Hawai'i. The subject property's street address is 1611 Nohoana Place.
2. **County Zoning.** Single-Family Residential – 15,000 sq. ft. (RS-15).
3. **State Land Use Designation.** Urban.

4. **Setback Requirements.** 20 feet front and rear; 10 feet for side.
5. **Variance Application.** The applicant/owner submitted the variance application, attachments, filing fee, and associated materials on August 9, 2018. The variance application's survey map dated July 13, 2018 was prepared by Niels Christensen, LPLS, The Independent Hawaii Surveyors, LLC. **(See Exhibit A-Site Plan)**  
  
The survey map shows that portion of the single-family dwelling encroaches 7.99 feet into the 20-foot rear (east) yard setback and the associated roof eave encroaches 4.62 feet into the 14-foot rear (east) yard open space.  
  
The encroachment leaves the single-family dwelling with a minimum 12.01-foot rear (east) yard setback and associated roof eave projection resulting with a 9.38-foot rear (east) yard open space.
6. **County Building Records.** Hawai'i County Real Property Tax Office records indicate that Building Permit #54424 was issued on December 7, 1972 for the construction of a single-family dwelling consisting of 3 bedrooms, 2 baths, living room, kitchen, dining area and garage.
7. **Agency Comments and Requirements.**
  - a. State Department of Health (DOH) memorandum dated August 28, 2018: "The Health Department found no environmental health concerns with regulatory implications in the submittals."
  - b. No comments received from Department of Public Works Building Division.
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 August 20, 2018 and August 30, 2018, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on August 29, 2018.
9. **Comments from Surrounding Property Owners or Public.** No written comments or objections from surrounding property owners or the general public were received.

#### **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 single-family dwelling into the 20-foot rear (east) yard setback and 14-foot rear (east) yard open space as required by the Zoning Code.

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 single-family dwelling constructed in 1972, nearly 46 years ago, and subsequent construction permits were issued and closed under valid building permit by the County for the existing single-family dwelling. 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 yard of the subject property include the following actions:

To remove the building encroachments and/or redesign the existing single-family dwelling denoted on the survey map to fit within the correct building envelope as prescribed by the Zoning Code 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.

Because the encroachment is within the rear yard setback, to consolidate the subject property with the adjacent rear yard property, which is owned by someone else, and re-subdivide the property to modify property lines and adjust minimum side yard setbacks are not viable options.

Both of these alternatives are not practical. Therefore, 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 single-family dwelling has been in existence for approximately 46 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.

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 68) will not meet the minimum rear yard open space requirements pursuant to Hawai'i County Code, Chapter 25, Zoning.

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 existing 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.

Zendo Kern  
Planning Consultant.  
Page 5  
September 28, 2018

4. An Ohana or Farm 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 laws 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 this Variance, VAR-18-000490.

Sincerely,



MICHAEL YEE  
Planning Director

LHN:nci

P:\Admin Permits Division\Variances From CoH02\Zone2\VAR18-000490 TMK2-4-061-077 Grant.doc.rtf

Enclosure: Exhibit A- Site Plan

cc: Real Property Tax Office (Hilo)  
Gilbert Bailado, GIS

**EXISTING CONDITIONS UPON LOT 68**  
**MAUNAKAI CIRCLE SUBDIVISION**  
 WAIAKEA, SOUTH HILO  
 ISLAND OF HAWAII  
 HAWAII

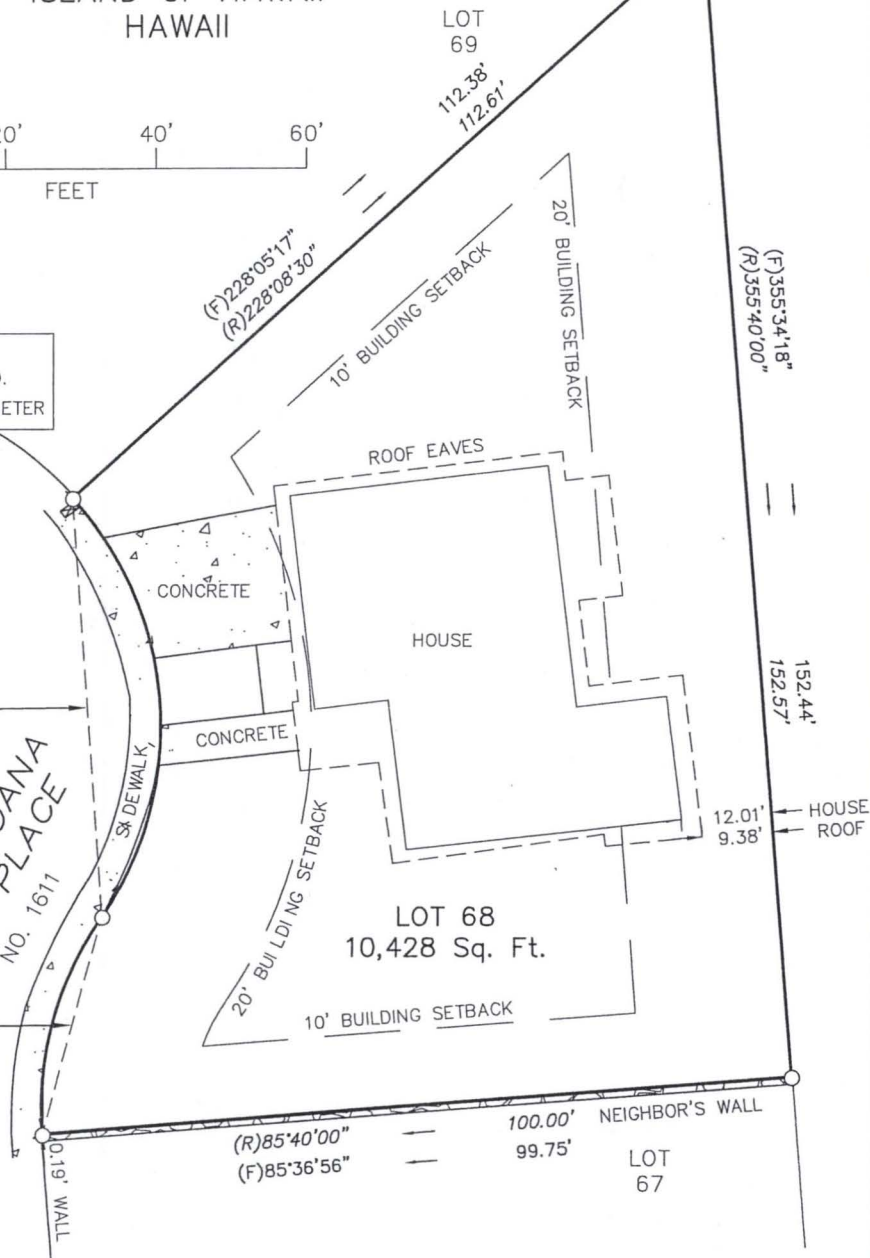


**LEGEND**  
 ○ = PIPE FND.  
 ◊ = WATER METER

R=45.00'  
 CH=55.72'  
 (F)176°03'08"  
 CH=55.70'  
 (R)176°22'31"

R=45.00'  
 CH=30.00'  
 (F)195°15'28"  
 CH=30.00'  
 (R)195°08'00"

TRUE NORTH  
 SCALE: 1 IN. = 20 FT.



This work was prepared by me  
 or under my direct supervision

*Niels Christensen*

Niels Christensen  
 Licensed Professional Land Surveyor  
 License Number 9077

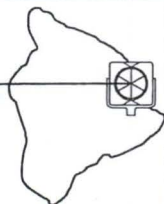


**NOTES:**

1. The features shown hereon were located by an actual field survey completed on July 11, 2018.
2. This map shows, "the location of any improvements in the vicinity of perimeter property lines", (Item K-2 of "Purchase Contract").
3. Field measured dimensions (F) are within acceptable tolerances as compared to record dimensions (R) for land of this type and in this subdivision.
4. The attached Report pertains to improvements near property lines and County building setbacks.
5. This map should not be changed, altered or used to execute any transaction or application other than that indicated on this particular "Purchase Contract".

**The Independent Hawaii Surveyors, LLC**

P.O. BOX 577  
 Hilo, HI 96721  
 Phone 808 959-0360  
 FAX 808 959-0353  
 info@hawaiiboundary.com



Date: July 13, 2018  
 Drawing: JOB12793.dwg  
 TMK: (3) 2-4-61: 77

**EXHIBIT**  
A