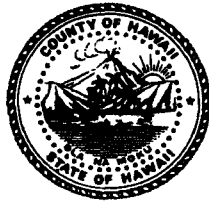


Harry Kim
Mayor



Michael Yee
Director

Daryn Arai
Deputy Director

West Hawai'i Office
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County of Hawai'i
PLANNING DEPARTMENT

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May 21, 2018

Anna Marie Chavira
P.O. Box 606
Kailua-Kona, HI 96745

Dear Ms. Chavira:

SUBJECT: Application: Variance - VAR 19-000504
Applicant: BEN GARNER
Owners: BENJAMIN J. GARNER
Request: Variance from Chapter 25, Zoning, Article 5, Division 1,
Section 25-5-76, Minimum Yards Requirements and
Section 25-4-44(a) Permitted Projections into Yards &
Open Space Requirements
(Encroachment into North Rear Yard Setback & North
Open Space Requirement)
Tax Map Key: 7-3-023:092 Lot 41

The Planning Director certifies the **approval** of Variance No. 19-000504, subject to variance conditions. The variance will allow portions of the second dwelling (ohana dwelling unit) walls to remain with minimum 15.91-foot and 16.08-foot rear (north) yard setback and roof overhangs (eaves) to remain with minimum 12.59-foot and 12.81-foot (north) open space, in lieu of the required 20-foot rear yard setback and 14-foot open space requirement. These exceptions are in lieu of the required 20-foot rear yard setback, and 14-foot open space requirement, as required by the Hawai'i County Code, Chapter 25, Zoning, Section 25-5-76, Minimum yards requirements and Section 25-4-44(a), Permitted Projections into Yards and Open Space Requirements.

BACKGROUND AND FINDINGS

1. **Location.** The subject property, Lot 41, contains approximately 19,710 square feet and is situated within the "Kona Coastview", Unit IV, Subdivision, Kailua-Kona, North Kona, Hawai'i. The subject property's street address is 73-1101 Ahulani Street, Kailua-Kona, HI 96740.

2. **County Zoning.** Agricultural – 5-Acres (A-5a).
3. **State Land Use Designation.** Urban.
4. **Setback Requirements.** 20 front and rear and 10 feet for sides.
5. **Variance Application.** The applicant/owner submitted the variance application, attachments, filing fee, and associated materials on February 5, 2019. The variance application's survey map dated December 12, 2018 was prepared by Thomas G. Pattison, LPLS and denotes that portions of the dwelling walls and roof eaves are built into the rear (north) yard setback and rear (north) open space requirement. **(See Exhibit A-Site Plan)**

The survey map dated December 12, 2018 shows sections of the dwelling walls encroaching 4.09-foot and 3.92-foot with a minimum 15.91-foot and 16.08-foot (north) rear yard setback, in lieu of the required 20 foot rear yard setback, with roof overhangs (eaves) encroaching 1.41-foot and 1.19-foot with a minimum 12.59-foot and 12.81-foot (north) rear open space requirement, in lieu of the required 14-foot (north) open space requirement.

6. **County Building Records.** Hawai'i County Real Property Tax (RPT) Office records indicate that a building permit (#905975) was issued on July 18, 1990 for a second dwelling (ohana dwelling unit). In addition, RPT Office historical records indicate that building permit (#0810) was issued on April 30, 1974 for single family dwelling. The RPT office records also indicate that an electrical permit (# EK2016-00919) was issued on June 3, 2016 to repair/reliance existing service equipment for the back house and electrical permit (#EK2016-00950) was issued on June 14, 2016 for existing service equipment repair and relocation on rear house, electric only. A plumbing permit (#M2006-1711K) was issued October 30, 2006, for a new water service connection.
7. **Ohana Dwelling Permit.** The second dwelling located in the rear of the Lot 41 was approved as an ohana dwelling unit per Ohana Dwelling Permit No. 90-0012, dated February 1, 1990.
8. **Agency Comments and Requirements.**
 - a. State Department of Health (DOH) email dated March 22, 2019. "The Department of Health does not have any comment regarding the above noted Variance Applications."
Steven K. Okoji, Supervising Sanitarian, Hawaii District Health Office, West Hawaii
 - b. Department of Public Works, Building Division (DPW) Memo dated February 27, 2019. "At the time of completion, the subject complied to all building code regulations that were in effect.

This status report reflects Building Division records only and does not include information from other agencies. Should you have any questions, regarding matters contained herein, please feel free to contact Chris Domino at phone no. (808) 323-4770.

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 February 23, 2019 and February 27, 2019, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on February 26, 2019.
10. **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 April 4, 2019.

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/applicant submitted the variance application to address or resolve the encroachment of the second dwelling walls into the 20-foot rear (north) yard setback and encroachment of the roof overhangs (eaves) into the 14-foot (north) open space requirement as required by the Zoning Code.

The survey map dated December 12, 2018 shows sections of the second dwelling (ohana dwelling unit) walls encroaching 4.09-foot and 3.92-foot with a minimum 15.91-foot and 16.08-foot (north) rear yard setback, in lieu of the required 20 foot rear yard setback, with roof overhang (eaves) encroaching 1.41-foot and 1.19-foot with a minimum 12.59-foot and 12.81-foot (north) open space requirement, in lieu of the required 14-foot (north) open space requirement.

The encroachments leave with a minimum 15.91-foot and 16.08-foot rear (north) yard setback and 12.59-foot and 12.81-foot (north) open space, in lieu of the required 20-foot rear yard setback and 14-foot open (north) space requirement.

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 1991, approximately 28 years ago, and subsequent plumbing and electrical permits were issued by the County for the existing single-family dwelling and second dwelling (ohana dwelling unit) 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 rear yard of the subject property include the following actions:

Remove the building encroachments and/or redesign the second dwelling (ohana dwelling unit) 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 second dwelling (ohana dwelling unit) was in compliance with all County requirements. Any structural or design correction of the second dwelling (ohana dwelling unit) 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 second dwelling (ohana dwelling unit) has been in existence for approximately 28 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 second dwelling built (ohana dwelling unit) on the subject property ("LOT 41") will not meet the minimum rear yard and open space 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 second dwelling (ohana dwelling unit) walls and roof overhangs (eaves) 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.

Anna Marie Chavira

VAR 19-000504

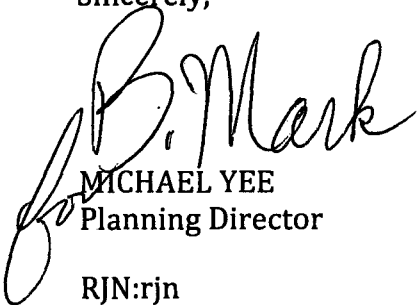
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4. An Ohana Dwelling permit shall not be approved for the subject property, subject to the provisions of the Hawai'i County Code, Chapter 25, (Zoning) or state law, which may change from time to time.
5. The applicant/owner(s), successors or assigns shall relocate or remove the structure identified as "moveable shed" 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-19-000504.
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.

Should any of the foregoing variance conditions not be complied with, the Planning Director may initiate proceedings to null and void Variance-16-000466.

Sincerely,



MICHAEL YEE
Planning Director

RJN:rjn

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Anna Marie Chavira

VAR 19-000504

May 21, 2019

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xc: Natalie Whitworth, DPW Engineering Division
Real Property Tax Office (Kona)
Gilbert Bailado, GIS

Benjamin J. Garner
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