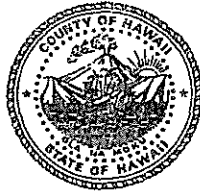


Harry Kim  
Mayor



Christopher J. Yuen  
Director

Roy R. Takemoto  
Deputy Director

**County of Hawaii**  
**PLANNING DEPARTMENT**  
101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720-3043  
(808) 961-8288 • Fax (808) 961-8742

April 7, 2004

Ms. Anne Rene La Vasseur  
HCR-2 Box 9627  
Keeau, HI 96749

Dear Ms. La Vasseur:

**SUBJECT: VARIANCE PERMIT NO. 1419 (VAR 03-040)**  
**Applicant: ANNE RENE LA VASSEUR**  
**Owner: ANNE RENE LA VASSEUR**  
**Request: Variance from Minimum Yards**  
**Pursuant to Chapter 25, the Zoning Code**  
**Tax Map Key: 1-5-057:010, Lot 386**

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After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request **subject to conditions**. Variance Permit No.1419 allows portions of a raised wooden deck on and along the dwelling's concrete water tank and "above-grade" swimming pool located on Lot 386, to remain pursuant to the recent variance site plan map submittal and annotations by staff. Portions of the "AS-BUILT" wooden deck straddling common boundary line and other building encroachments will be removed and comport to minimum building yards stipulated by the variance and/or Department of Public Works (DPW) building permit requirements. The variance request is from the property's (TMK) minimum yards pursuant to the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 7, Section 25-5-76 Minimum yards, (a), Section 25-5-77, Other regulations, and Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open space requirements, (a), respectively.

**BACKGROUND AND FINDINGS**

1. **Location.** The subject property, Lot 386 containing 0.23 acre, Block 10, being a portion of Land Court Application 1053, Map 65, is within the Hawaiian Paradise

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Park Subdivision, and situated at Keaau, Puna, Hawaii.

The property is zoned Agricultural (A-1a) by the County and designated Agriculture "A" by the Land Use Commission (LUC).

**Variance Application-Site Plan**. The applicant submitted the variance application, attachments, on June 23, 2003. The variance application's site plan is drawn to scale and was prepared by a land surveyor. The survey map dated June 12, 2003 identifies the dwelling and attached raised deck/pool improvements on "LOT 386". **Note:** The variance site plan map does not show the existing wastewater system location.

The applicant's background states in part:

"The property was appraised for the owner's mortgage lender on January 31, 2002, by Lawrence Appraisal Group. The encroachments were completed without realizing that there existed unresolved building position issues.

Owner submits that any possible encroachments into Lot. 11 will be eliminated.

Owner was also unaware when the property was purchased, that the entire existing pool and deck would need to be replaced, due to their advanced deterioration from rust, dry rot, and neglect. Current owner started to repair what she thought were a few replaceable parts to the pool and several boards to the existing deck, when it suddenly became clear that both would need to be replaced in their entirety. At that time the repairs were already underway with the contractor.

Owner was faced with quickly finding a similar-sized pool to fit the area. The existing size was no longer manufactured. Owner chose one as close to the existing size as possible, which was one foot narrower and five feet longer than the previous pool. Therefore, the pool ended up one foot farther from the bordering vacant lot on the northwest, and the deck ended up four feet closer to the neighboring home/lot on the northeast than it was before.

The existing rotting back stairs to the pool were eliminated for security reasons, and a lattice-type fence was added around the entire pool for the same reason. The preexisting (sic) pool had no security measures to keep unauthorized people

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from using the pool/deck and from accessing that part of the house without permission. This is a liability that the owner promised the household insurance carrier to ameliorate.”

The applicant submitted a copy of a survey map dated April 3, 2002 and survey map dated June 12, 2003. The applicant contends that the dwelling and **original** deck, stairs, and swimming pool improvements were built and established on the TMK property before she purchased the property pursuant to survey map dated April 3, 2002. Due to the dilapidated condition of the “DECK” and “ABOVE GROUND POOL”, identified on the survey map dated April 3, 2002, the current owner hired a contractor to rebuild the wooden deck and replace the “above grade” swimming pool. The **original** pool/deck improvements were replaced with “RAISED DECK WITH POOL” improvements denoted on survey map dated June 12, 2003.

The **original** “DECK” and “ABOVE GROUND POOL” constructed before April 3, 2002 and recent deck repairs and above grade replacement pool (“RAISED DECK WITH POOL”) denoted on survey map dated June 12, 2003 were built or installed without building permits.

2. **Agency Comments and Requirements (VAR 03-040):**

- a. The State Department of Health (DOH) memorandum dated July 3, 2003, states:

“The Health Department found no environmental health concerns with regulatory implications in the submittals.”

- b. The Department of Public Works (DPW) memorandum dated July 3, 2003, states:

“We have reviewed the subject application forwarded by your memo dated June 25, 2003 and oppose the approval of the application for the reasons noted below.

Building permit #922200 for the subject dwelling has no status of inspection.

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The minimum setbacks shall be maintained as follows: residential structures-3 ft. side and 3 ft. rear; commercial structures-5 ft. side and 5 ft. rear.

No building permit was taken for the raised deck with pool as shown on the site survey map done by Niels Christensen.

Please refer questions regarding the building permits to the Building Division at 961-8331.”

3. **Notice to Surrounding Property Owners.** Proof of mailing a first and second notice was submitted to the Planning Department. For the record, it appears that the first and second notice was mailed on June 27, 2003 and July 18, 2003 by the applicant.

4. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. The following objections letters (original and copies) and support letter were received from the adjoining property owner(s):

- a. Objection letter dated July 18, 2003 from Paige Johnson (TMK: (3)1-5-057:063, Lot 383).
- b. Objection letter dated July 2, 2003 from Michael W. Sutherland, Esq. representing-Mr. and Mrs. Vernon Befort (TMK: (3) 1-5-057:011, Lot 385).

**Note:** For the record, on August 20, 2003, Planning Department staff met and accompanied the applicant during an inspection of subject property (LOT 386). Digital pictures to verify or determine the deck's original position and pool position were made and other design options including fencing/landscaping options were discussed. The applicant agreed to remove the portions of the wooden deck and any deck/pool improvements encroaching into adjoining TMK property(s) owned by Paige Johnson and Vernon Befort, Et al., respectively.

- c. Inquiry letter addressed to Jeffrey Darrow (PD-Staff) received on July 14, 2003.

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- d. Support letter dated July 22, 2003 from Steven and Denise Cimino.
- e. Copy of letter dated August 5, 2003 from applicant addressed to Mr. and Mrs. Vern Befort.
- f. Copy of letter dated August 5, 2003 from applicant addressed to Paige Johnson.
- g. Copy of proposal-letter dated Tom Mullin, dated September 14, 2003, addressed to Vernon Befort.
- h. Letter from applicant, dated September 22, 2003, requesting an extension of time to render a decision by the Planning Director.
- i. Letter addressed to Jeff Darrow dated October 28, 2003 declining to sell portion or adjoining property to applicant.
- j. Copy of letter dated October 28, 2003 from Befort with applicant's handwritten notes.
- k. Numerous inquiry letters from agencies and others received.

#### **SPECIAL AND UNUSUAL CIRCUMSTANCES**

The applicant filed the variance request subsequent to a complaint filed with the Planning Department regarding the deck and status of the swimming pool position(s). The applicant/owner is trying to resolve original building encroachment issues not disclosed during escrow and address the position of the replacement pool and expanded wooden deck improvements constructed without building permits. The variance application's site plan map is dated June 12, 2003 and prepared by a surveyor. This current survey map denotes the dwelling and attached raised deck/pool position(s), "AS BUILT", on the subject TMK property. This recent survey map was completed after the applicant/owner replaced the original pool and deck constructed by the previous owner and issuance of complaint notice sent to the applicant and current owner by the County. The previous owner did not apply for a building permit to construct the original deck and pool. For the record, the dwelling's original concrete water tank was constructed circa 1991 pursuant to B No. 911217. It appears that portions of the original concrete water tank attached to the dwelling encroach into the property's minimum 20 feet rear

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yard.

The dwelling, "above-grade" pool, wooden deck improvements, and stairway located on or along the dwelling's rainwater catchment concrete storage tank were constructed or established on the TMK property before the applicant/current owner purchased the property. According to the applicant, the original "above-grade" swimming pool, wooden deck, and stairway required extensive repairs. The current owner's decision to replace the wooden deck, stairway, and original swimming pool was due liability or insurance concerns and other building economics. The building encroachment issues within the rear yard and respective side yard and attendant open yard spaces were compounded after the current owner or contractor expanded the area of the original wooden deck and replaced the original "above-grade" pool with a larger pool.

### **ALTERNATIVES**

Alternatives available to the applicant or current owner include the following actions:

1. Remove the wooden deck and pool encroachments within the affected side and rear yards.
2. Redesign and relocate water tank, deck, and pool improvements to fit within the building envelope prescribed by the Zoning Code, and/or other similar design alternatives, etc.
3. Confer with adjoining property owners to consolidate the subject TMK property with the adjoining TMK property and resubdivide the resultant consolidated lot to modify the property geometry and/or change the metes and bounds descriptions in accordance with the minimum side yard and open space requirements of the Zoning Code.

### **INTENT AND PURPOSE**

The purpose and intent 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.

It appears that the original pool and deck position and encroachments within the affected yards and attendant open space requirements were not detected at the time of construction or before the

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current owner purchased the property. Pursuant to the applicant's background information, the original pool/deck improvements were built by the previous owner and included in the appraisal/sale of the TMK property to the current owner. According to the applicant, the property appraisal did not reveal or disclose any building discrepancies or encroachment issues. No building citations were filed against the TMK property by the DPW-Building Division or other agencies at the time of the sale. The encroachment issues were revealed after the original wooden deck and "above-grade" swimming pool were rebuilt or replaced without building permits by the current owner and complaint was filed and investigated by the Planning Department. The adjoining property owner(s) do not want to participate in a consolidation and resubdivision action to change or modify property boundary lines (Refer to correspondence in variance file). In view of the property's past building history, character of the neighborhood, other extenuating circumstances cited by the current owner and the current owner's willingness to address the original non-permitted building issues, it is felt that the applicant's variance request can be partially approved subject to variance conditions. The variance conditions will require the applicant or current owner to secure an "after-the-fact" county building permit to rebuild the original wooden deck built along the concrete water tank and replace "ABOVE GROUND POOL" pool. Portions of the existing wooden deck will removed to comport with the original wooden deck's size and position denoted on the survey map dated April 3, 2002 and a "CONCRETE" encroachment or portion of the original swimming pool's foundation within adjoining property ("LOT 385") identified on the variance site plan map dated June 12, 2003 will be removed. In addition, fencing and/or other buffer improvements and/or planting materials on the pool or applicant's property to promote privacy will be required. (Refer to copy of variance site plan dated June 12, 2003 with applicant's annotations in variance file and variance conditions).

The subject variance application was acknowledged by letter dated July 8, 2003. Additional time to consider the character of the area, schedule a site inspection to view the property and adjoining property(s), review the objections/concerns by adjoining property owner(s), and examine building permit records was deemed necessary. The applicant requested and agreed to extend the time to April 30, 2004 to consider the variance request and render a variance decision subject to conditions.

Based on the foregoing findings, property site inspection, and staff discussion(s) with adjoining property owner(s) and other affected parties, a decision to approve a partial variance with conditions 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

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substantial adverse impact to the area's character and to adjoining properties.

### PLANNING DIRECTOR'S DECISION AND VARIANCE CONDITIONS

This variance request is approved subject to the following conditions:

1. The applicant/owner(s), 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 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/owner(s), their successors or assigns, officers, employees, contractors, or agents under this variance or relating to or connected with the granting of this variance.
3. Portions of above grade swimming pool and wooden deck improvements, AS BUILT, on the subject tax map key property (LOT 386) will not meet Chapter 25, the Zoning Code's minimum rear and side yard(s) and attendant minimum open space requirements. The approval of this variance allows **portions** of the new swimming pool and **original** wooden deck improvements to remain. Portions of the wooden deck and encroachments identified on the application's site plan map dated June 12, 2003 in subject variance file will be removed and subject to following requirements:
  - a. An "after-the-fact" building permit for the "above-grade" swimming pool and **original** deck improvements shall be secured from the DPW-Building Division on or before October 31, 2004 by the applicant or current owner. Portions of the existing wooden deck improvements will be removed to comport to the original wooden deck area and portions of "CONCRETE" or building encroachments within adjoining property (LOT 385) will be removed on or before December 31, 2004. The location or position of the "above-grade" replacement pool, "AS-BUILT", shall comply with the minimum DPW-Building Division building requirements.
  - b. Any relocated gutter or rainwater downspout(s) improvements shall be modified to direct rainwater "run-off" away from the common side



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boundary line between the subject TMK property and adjoining property(s).

- c. The owner(s) shall construct a minimum 8 feet high chain link fence by 20 feet length privacy chainlink fence on subject TMK property and along the common side boundary line shared with adjoining property (LOT 385) to buffer the pool from adjoining property-TMK: (3) 1-5-057:011, Lot 385 **or** install alternative privacy fence or landscaping planting materials **on or along** the swimming pool edge to promote privacy. No obnoxious landscaping materials will be permitted to grow on any buffer fence or alternative buffer improvements allowed by the Planning Department. The chainlink buffer fence improvement or approved alternative buffer or landscaping improvements shall be installed on the subject TMK property before December 31, 2004 and maintained in association with the "above-grade" swimming pool use.
  - d. The swimming pool and raised deck area may not be enclosed or modified into a living area pursuant to County Building Code.
  - e. The outstanding building permit BP No. 922200 and "after-the-fact" building permit together with any other construction permits for the dwelling, wooden deck, "above-grade" swimming pool, gutter-downspout relocation, and other related site improvements shall be "finalized" or closed by the DPW on or before December 31, 2004 and prior to any further change in title or sale of the property.
  - f. The applicant or current owner shall comply with variance condition No. 3 and file a written status report addressed to subject variance file on or before January 31, 2005.
4. No permit shall be granted to allow an ohana dwelling or building permit issued to allow construction of an "ohana" dwelling shall be granted to the subject TMK property, subject to provisions of the Zoning Code or State Law which may change from time to time.
  5. Future building improvements and permitted uses shall be subject to State law and County ordinances and regulations pertaining to building construction and

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building occupancy.

Should any of the foregoing conditions not be complied with, the Planning Director may proceed to declare this Variance Permit null and void.

Sincerely,



CHRISTOPHER J. YUEN

Planning Director

WRY:mad

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cc: Real Property Tax-Hilo  
Planning Dept. – Kona  
Zoning Inspector-Hilo  
Paige Johnson  
Michael W. Sutherland, Esq.  
Steven and Denise Cimino  
Vern Befort, Et al.  
Gary Safarik, Councilmember