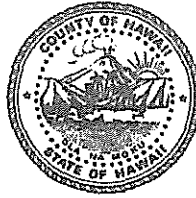


Harry Kim  
Mayor



Christopher J. Yuen  
Director

Brad Kurokawa, ASLA  
LEED® AP  
Deputy Director

County of Hawai'i  
PLANNING DEPARTMENT

101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720-3043  
(808) 961-8288 • FAX (808) 961-8742

March 8, 2007

Mr. Brian T. Nishimura  
BRIAN T. NISHIMURA  
PLANNING CONSULTANT  
101 Aupuni Street, Suite 217  
Hilo, HI 96720

Dear Mr. Nishimura:

**VARIANCE APPLICATION-VAR 07-004 (Denial)**

**Applicant:** BRIAN T. NISHIMURA,  
PLANNING CONSULTANT

**Owner:** REX A. RAMSEY

**Request:** Variance from Chapter 25, Zoning,  
Minimum yards

**Tax Map Key: 1-5-087:012, Lot 2**

After reviewing subject variance application submitted, the Planning Director **denies** subject variance application and request to allow portions of a "HOUSE" (2-story single family dwelling) to remain on Lot 2, "AS-BUILT", with minimum 9.03 feet to minimum 11.03 feet front yard and attendant minimum 7.06 feet front yard open space in lieu of minimum 15.00 feet front yard and minimum 10.00 feet front yard open space according to the applicant's site plan map dated May 26, 2005. The variance is from the TMK property's minimum front yard and attendant minimum front yard open space required 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).

The **denial** of the subject variance application is based on the following:

**BACKGROUND AND FINDINGS**

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1. **Location.** The subject TMK property containing 8662 square feet, being Lot 2, Block 59, Hawaiian Beaches Subdivision, is situated at Waiakahiula, Puna, Hawaii.

The property is zoned Agricultural (A-1a) by the County and designated Urban "U" by the Land Use Commission (LUC). The property is within the Special Management Area (SMA) and the property abuts the shoreline.

2. **Variance Application-Site Plan.** The applicant submitted the variance application, attachments, and filing fee on January 11, 2007. The variance application includes a map or extract of a shoreline survey map approved as of January 26, 2004 by the Chairman, Board of Land and Natural Resources and variance site map prepared by The Independent Hawaii Surveyors, LLC, dated May 26, 2006. The variance site plan map, drawn to scale, denotes portions of the "HOUSE" on including roof eaves on "LOT 2" were built into the property's minimum 15 feet front yard of the subject TMK property.

The applicant's "PROJECT BACKGROUND" report states:

"The owners of the subject property designed a dwelling to fit on the property after the Certified Shoreline Survey was approved on January 26, 2004. Building Permit No. B2004-1419H was issued on August 2, 2004 for a new two-bedroom, two-bath dwelling having a living area of 2,164 square feet. A surveyor was utilized to shoot the setback line and the location of the corners and pillars of the house. A contractor was hired and he began forming the foundation according to the markers placed by the surveyor. The initial contractor quit the job after two weeks and there was delay of several months before a new contractor was hired. The new contractor proceeded to form the foundation and continue building the house assuming that the markers were correct. While the dwelling was still under construction, but after the walls and roof were already completed, a zoning inspector questioned the setbacks of the dwelling. Upon measurement it was determined that there was an encroachment into the front setback. A survey report prepared by The Independent Hawaii Surveyors, LLC, dated June 1, 2005 indicated that, "The house lies 22.64 feet from the Certified Shoreline; its roof lies 20.39 feet from this boundary. The house extends 5.97 feet into the front County Zoning Code 15-foot building setback; its roof extends 7.94 feet into this setback. (See Attached Survey Report and Map)

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The owners designed a dwelling that would meet the zoning code and shoreline setback requirements. Building Permit No. B2004-1419H was issued on August 2, 2004 for a new two-bedroom, two-bath dwelling having a living are of 2,164 (sic) square feet. Apparently, a siting error occurred during the construction of the dwelling resulting in the dwelling encroaching into the front yard setback area.”

**Note:** The variance site plan map does not identify the location of the cesspool or septic system. The variance request does not address the location or position of the dwelling’s driveway or any walls, fencing, and/or landscaping within the property along or common boundary lines shared with adjoining property including the shoreline.

3. **County Building Records:**

Real Property Tax Office Records show 1-Building Permit (B2004-1419H), 1-Electrical Permit (E2005-0937H), and 1-Mechanical (M2005-0113H) or Plumbing Permit were issued to subject TMK property.

4. **Notice of Violation and Order (ZCV 05-006) (File No. 05-026E)**

The Notice of Violation and Order (ZCV 05-006) file includes letter dated March 24, 2005 sent by Certified Mail to owner’s designee or Project Manager-Sheryl Fletcher. Portions of this file including a copy of foregoing violation letter(s) or other submittals from this file have been incorporated into subject variance file as reference and/or cited in the variance background report and findings below.

5. **Agency Comments and Requirements-VAR 07-004:**

- a. The State Department of Health (DOH) memorandum is dated February 8, 2007. Refer to the DOH memorandum in subject variance file.
- b. The Department of Public Works (DPW) memorandum dated February 14, 2007 states in part:

“NO COMMENTS”

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6. **Notice to Surrounding Property Owners.** The applicant submitted a copy of notices sent to surrounding property owners and affidavits to the Planning Department. For the record, the first and second notices were mailed on January 24, 2007 and January 31, 2007, respectively, by the applicant. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on January 25, 2007.
7. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. The following comments and/or objection letter(s) (fax-transmittal including attachments) were received.
  - 6a. Objection letter (fax) dated February 9, 2007 and attachments received on February 9, 2007 and letter (fax) dated March 7, 2007 from Patrick J. Diddy received on March 8, 2007.

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

The applicant, on behalf of the owner, submitted the variance application to address the dwelling encroachments within the subject TMK property's minimum 15 feet front yard and attendant minimum 10 feet front clear space required by Chapter 25, Zoning. The variance application's site plan map was prepared by a surveyor and denotes a "cross hatched footprint" of "HOUSE" on "LOT 2". This variance site plan map dated May 26, 2005 denotes portions of the "HOUSE" or dwelling/roof eaves were built into the property's minimum 15 feet front yard. After reviewing the applicant's variance application and submittals, the building inspector's copy of approved plot plan and dwelling plans and copies of correspondence related to the subject TMK property on file at the DPW-Building Division in Hilo including building inspection records between January 4, 2005 and January 23, 2007, zoning violation letters, and amount of time which lapsed between the issuance of the first notice of violation letter dated March 24, 2005 and letter dated December 26, 2006 assessing the owner a \$2000 fine, before filing of the subject variance application at the Planning Department on January 11, 2007, essentially, after the owner, owner's designee, and licensed contractor "completed" the dwelling, the Planning Director finds there are no special and unusual circumstances supporting the applicant's variance request or variance application based on the following:

The applicant's background report "**REASONS SUPPORTING VARIANCE REQUEST**" states and includes the following reasons and the Planning Department's findings utilizing Planning Department's files and other information obtained from the DPW-Building Division in Hilo:

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- “1. There are special or unusual circumstances applying to the subject real property which exists to a degree which obviously interferes with the best use or manner of development of the subject property. A siting (sic) error was made by the contractor which resulted in the roof of the dwelling projecting 7.94 feet and the wall of the dwelling projecting 5.97 feet into the required front yard open space and setback area. The apparent error in siting the dwelling was not discovered until the walls and roof of the dwelling were already constructed.”

Finding-1. A copy of the Certified Shoreline Survey certified by the, Chairman Board of Land and Natural Resources (BLNR) on January 26, 2004, the building inspector's copy of the approved plot plan and approved detailed construction plans associated with Building Permit No. B2004-1419H on file at the DPW-Building Division in Hilo, and copy of the Building Permit B2004-1419H issued to the subject TMK property were reviewed together. The copy of the building permit application was signed by Sheryl Fletcher “Attorney in fact for Rex Ramsey”. According to the DPW-Building Division in Hilo, Building Permit B2004-1419H was issued to applicant -Sheryl Fletcher for “Legal Owner: RAMSEY, REX ANDREW II” on August 2, 2004 and classified as a building permit issued to an “Owner Builder”.

In addition to the above, a copy of letter from Sheryl Fletcher's letter dated December 27, 2004 addressed to the DPW-Building Division, states in part:

“Rex Ramsey took out the above permit as an “Owner Builder”. He now wants to turn it over to the General Contractor Paul Baillie & Sons Builders, License number BC17054.”

The applicant's project background states in part “A surveyor was utilized to shoot the setback line and the location of the corners and pillars of the house. A contractor was hired and he began forming the foundation according to the markers placed by the surveyor. The initial contractor quit the job after two weeks and there was delay of several months before a new contractor was hired. The new contractor proceeded to form the foundation and continue building the house assuming that the markers were correct.”

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Therefore, in spite of the approved plot plan and detailed building plans, stamped by a Licensed Architect, at the job site which includes an approved plot plan denoting the property's building envelope and minimum yards required by the SMA/shoreline survey map and minimum building yards required by the Zoning Code clearly requiring the dwelling to be built outside the 20 feet wide shoreline setback area and meet minimum 15 feet front yard and minimum 8 feet side yard(s) and hiring a "surveyor" to "shoot the setback line and the location of the corners and pillars of the house" after issuance of the building permit on August 2, 2004 and/or prior to licensed contractor's letter dated December 27, 2004, the "surveyor" or foundation survey to locate the pillars should have disclosed immediately or verified that the proposed dwelling's footprint was outside the building envelope denoted on the approved plot plan. It appears that the "Owner Builder" or his designee and "new contractor" or licensed contractor utilized the surveyor's pillar locations and continued to build the "HOUSE" which includes a portion of the living area (approximately 4 feet x 48 feet + "pop out" 2 feet x 7 feet = approximately 206 square feet) and associated roof eaves within the property's minimum 15 feet front yard and attendant minimum 10 feet front open space.

And, according to the applicant's project background, since a "surveyor" was utilized to "shoot the setback line and pillars", it appears that this construction survey performed by a "surveyor" (which according to the applicant's background time frame was completed or done "several months" before a "new contractor was hired" should have immediately revealed to the owner builder or his designee several months before hiring the "new contractor" that the dwelling's foundation or portions of the dwelling's living area and roof eaves are outside the property's building envelope identified on the approved plot plan further resulting in some of the dwelling's walls and portions of the roof to be built into the property's minimum 15 feet front yard.

- "2. There are no reasonable alternatives that would resolve the difficulty. Strict enforcement of the open and setback requirements would result in a significant modification to the existing dwelling which has already been completed. The alternative of demolishing and removing the encroachments is unreasonable and would place excessive demands on the owner who thought he had taken the necessary precautions to have a surveyor shoot the required setback lines only to discover that a siting error had occurred."

Finding-2. A copy of a letter sent to the DPW-Building Division from licensed contractor Paul Baillie & Sons Builders dated December 27, 2004 states in part:

"Paul Baillie & Sons Builders, license number BC 17054, is now the General Contractor on the Rex Andrew Ramsey II residence, TMK (3) 1-5-087:012, permit number B2004-1419H obtained by the owner, Rex Andrew Ramsey II, and as such will see that all work is done per approved plans and applicable building codes."

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The Notice of Violation and Order (ZCV 05-006) dated March 24, 2005 sent by Certified Mail to owner's designee or Project Manager-Sheryl Fletcher, Page 3, states in part:

"On March 3, 2005, our CZM planner and our Zoning Inspector conducted another site inspection to verify the distance to the front property line and to confirm the placement of the dwelling based on the requirements setforth (sic) in our letter dated April 1, 2004, Subject: Special Management Area Use Permit Assessment Application (SMAA 04-17).

Ms. Sheryl Fletcher (Project Manager) had the contractor on the jobsite draw a "string-line" from the two front property pins. The distance measured from the "string-line" to the ground floor wall of the dwelling under construction was eleven (11) feet three (3) inches. Further, the two (2) foot wide by seven (7) foot long "cantilevered bathtub" within the Master Bathroom on the upper floor, facing the roadway, is nine (9) feet three (3) inches from the front property line. Our planner and zoning inspector have verified with these measurements that the front ground floor and second floor walls of the dwelling under construction is well within the minimum fifteen (15) foot front yard (setback)."

The violation letter dated March 24, 2005, Page 4, states in part:

"Our planner and zoning inspector observed that a "construction barrier" was not erected along the length of the shoreline setback. Further, large boulders were observed within the 20-foot shoreline setback are, possibly removed from the areas creating near-level ground for the massive "grade-beam footings" required per the permitted building plans."

And, the violation letter's condition dated March 24, 2005, Page 5, "Corrective action" states in part:

- "1) You are allowed to continue construction of the single-family dwelling, although, **all further work is limited only to finishing the roof.** Once the metal roofing is installed, **all further construction must cease.** You are then responsible for contacting our Zoning Inspector by telephone and in writing to the Planning Director that this phase of the construction has been completed and all further construction has ceased. **Further continuance of construction will be based on the survey determining the exact location of the front walls in relation to the front property line encroachment, and the roof projections in relation to the 20-foot shoreline setback.**"

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Therefore, during March 3, 2005 inspection of the subject TMK property by Planning Department staff, the project manager and “new contractor” were made aware of the dwelling’s misplacement or encroachment into the property’s 15 feet front yard of the subject TMK property. The March 24, 2005 violation letter limited further dwelling construction to “finishing the roof” and required the owner’s designee or project manager and/or contractor to “cease construction”. It appears that the owner or his designee engaged the services of a “surveyor” to “shoot the required setback lines” and verify that the dwelling was clearly outside the 20 feet shoreline setback area refers to a map dated May 26, 2005 and survey report prepared after the Zoning Violation letter dated March 24, 2005 was received by the owner’s designee. In spite of the Violation Letter and conditions dated March 24, 2005 citing encroachment issues, survey map dated May 26, 2005 and survey report dated June 1, 2005 identifying the encroachments into the property’s front yard, the owner or Project Manager-Sheryl Fletcher and/or licensed contractor ignored the original violation letter and other letter(s) regarding the violation, and completed the dwelling and dwelling encroachments prior to filing the variance application on January 11, 2007, nearly 1 year 10 months later. Therefore, after considering the lapse of time between issuance of the original March 24, 2005 violation letter and filing of the variance application, the owner or his designee and/or licensed contractor ignored and disregarded the March 24, 2005 letter’s condition to limit construction and “cease” constructing the dwelling encroachments within the property’s front yard by completing the dwelling and dwelling encroachments which were denoted on the May 26, 2005 survey map and clearly described in the attached survey report dated June 1, 2005. **The “difficulty” to significantly modify the “existing dwelling” or remove the “completed” dwelling encroachment within the property’s front yard are now a consequence of the owner or his designee or licensed contractor’s actions considering the owner or his designee and the licensed contractor were made aware of the dwelling’s encroachment issues within the property’s front yard in early March 2005, nearly 2 years ago.**

In addition, during the March 3, 2005 site inspection, Planning Department staff noted the required “construction barrier” was not installed or “erected along the length of the shoreline setback line” prior to starting construction of the dwelling according to an earlier letter dated April 1, 2004 addressed to Sheryl Fletcher, Esq. Therefore, it appears that the owner and owner’s designee ignored the requirement to erect a “construction barrier” prior to starting construction of the dwelling.



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- “3. The variance request is consistent with the general purpose of the zoning district, the intent and purpose of the Zoning Code, the County General Plan and will not be materially detrimental to the public welfare or cause substantial, adverse impact to the area’s character or to adjoining properties. The intent and purpose of the building setbacks and open space requirements is to assure that adequate air and light circulation is available between structures and property lines. Having the roof of the dwelling projecting 7.94 feet and the wall of the dwelling projecting 5.97 feet into the required front yard open space and setback area will not be detrimental to the character of this rural residential community.”

Finding 3. The Planning Department received an objection letter (fax) dated February 9, 2007 together with other submittals from Patrick J. Duddy. These fax submittals include a separate letter dated February 6, 2007 addressed to the applicant and it appears that copies of the objection letter(s), etc. were sent to a list of surrounding property owners or “neighbors”. The letter dated February 6, 2007 addressed to the applicant states in part:

Paragraph 1. “Please be advised that both, Rex Ramsey and Shirley (sic) Fletcher were told this home was located wrong in the foundation stage by myself and the contractor. They both were told after the wood framing was completed, that the home was too high and not in the allowable foot print where she told us to F---- off. I wrote the building department and Shirley (sic) Fletcher herself, letters to this effect and now you want to give her a variance?”

According to building inspection records obtained from the DPW-Building Division, it appears that the owner’s designee or contractor requested a “final” inspection to be done by the Building Inspector on January 23, 2007 for “the existing dwelling which has already been completed” or the dwelling including dwelling encroachments, “AS-BUILT”, prior to the Planning Director rendering a decision on the subject variance application. In view the dwelling’s history and inspection records obtained from the DPW, it appears that the owner’s designee and/or licensed contractor ignored the original March 24, 2005 Violation Letter’s condition to “cease construction” in 2005 and “completed” the dwelling on the subject TMK property in difference to the licensed contractor’s letter and declaration “that all work is done per approved plans and applicable building codes” addressed to the DPW dated December 27, 2004.

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Therefore, after considering the above findings, the objection letter and information received from a surrounding property owner, examining DPW inspection permitting and inspections record for the subject TMK property and the January 23, 2007 request asking the DPW-Building Division or Building Inspector for a "final" inspection for the "completed" dwelling and dwelling encroachment within the property's minimum front yard and attendant minimum front yard open space, the Planning Director finds the applicant's request for variance and application is not consistent with the general purpose of the zoning district, the intent and purpose of the Zoning Code and County General Plan; and, finds that the dwelling encroachments have caused a negative impact within the immediate neighborhood and adversely impacts the area's character and subdivision.

#### ALTERNATIVES

Alternatives available to the applicant to address the dwelling encroachment into the property's minimum front yard include the following actions:

1. After considering the property's limitations pursuant to the 20 feet wide shoreline area and minimum yards determination determined by the Planning Department's letter dated April 1, 2004 sent to the owner or owner's designee, it appears that the detailed building plans for the dwelling were finalized and submitted for agency approval. After the building permit was issued in circa August 2004, the applicant states that the dwelling's "pillars" or the dwelling's foundation were measured by a "surveyor". As such, after this survey for the dwelling's foundation, the owner or his designee/builder should have known immediately that the dwelling (approximately 48 feet x 48 feet) or a portion of the building's footprint or living area was sited outside the building envelope on the approved plot plan and within the property's minimum 15 feet front yard. Subsequently, a licensed contractor was hired by the owner according to a letter to DPW dated December 27, 2004 which declares "that all work is done per approved plans and applicable building codes". In addition, it appears that the owner's designee and licensed contractor ignored the approved "PLOT MAP" dated June 4, 2004 which clearly shows the property's building envelope and the property's minimum yards on approved building plans maintained at the project site and/or inspector's copy filed with the DPW-Building Division.

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In consideration of the above, the owner builder or his designee could have redesigned the dwelling or relocate the dwelling elsewhere within the property's building envelope prescribed by the Zoning Code and Shoreline Survey or immediately seek a variance according to the March 24, 2005 Violation Letter. The owner or his designee and licensed contractor ignored the original Violation Letter's condition and other follow-up letters sent and according to the applicant, "completed" the dwelling and dwelling encroachments before filing the variance request and application in January 2007. The applicant, on behalf of the owner, is now requesting a variance from Chapter 25, Zoning, to allow portions of the "completed" dwelling to remain, "AS-BUILT", within the property's minimum 15 feet front yard and attendant minimum 10 feet front yard open space disclosed by a survey map dated May 26, 2005 and survey report dated June 1, 2005.

2. Consolidation of Lot 2 with a portion of the right-of-way (Welea Street) fronting the subject property and resubdivision to modify property lines or adjust minimum yards, etc.

### **INTENT AND PURPOSE**

The intent and purpose 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.

After considering the dwelling's building history and violation letters sent to the owner or his designee, DPW-Building Division records and permitting and inspection history for the building permit, and above variance background and findings including the objection letter and submittals receive, the Planning Director finds that the dwelling encroachment into the property's minimum 15 feet front yard were self created by the owner or his designee and found to be physically and/or visually obtrusive from neighboring properties.

Based on the variance background report submitted by the applicant and findings by the Planning Department, review of approved plans and other building information obtained from the DPW-Building Division in Hilo, and other circumstances regarding the dwelling's building history, the applicant's request to allow portions of a dwelling to remain, "AS-BUILT", within the property's minimum front yard and minimum front yard open space would not be consistent with the general purpose of the zoning district and the intents and purposes of the Zoning Code, Subdivision Code and County General Plan.

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

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The subject variance request and variance application is **denied** and the owner or his designee is required to immediately remove the portions of the dwelling within the subject TMK property's minimum front yard identified on the variance applications site plan map and be aware of the following deadline(s) and other requirements:

1. The portion(s) of the "completed" dwelling, "AS-BUILT", constructed into the property's minimum 15 feet front yard and minimum 10 feet front yard open space identified on the variance site plan map dated May 26, 2005 shall be removed on or before **May 31, 2007**. Upon completion of the foregoing corrective action, you are responsible for contacting the Hilo Zoning Inspector-Mr. Robert Usugawa at (808) 961-8288 by telephone and in writing to the Planning Director and meet DPW-Building Division requirements to carry out this corrective action.
2. The owner-Rex A. Ramsey II shall pay any fine and cumulative fines due the County pursuant to letter-Notice of Violation and Order (ZCV 05-006) dated December 26, 2006 sent by Certified Mail to Rex A. Ramsey c/o Sheryl Fletcher, Project Manager, and letter-Assessing of Civil and Daily Fines for Non-Compliance with Corrective Actions in the Submittal and Approval of a Required Variance for a Front Yard (Setback) Violation with the Special Management Area (SMA) (File No. 2005-026E) dated December 26, 2005 sent by Certified mail to Rex A. Ramsey II.
3. Any building modification or future dwelling additions or improvements and permitted uses on the subject TMK property shall be subject to State law and County ordinances and regulations including SMA requirements pertaining to building construction and building occupancy.

In accordance with a recent charter amendment and Ordinance No. 99-112, you may appeal the director's decision and request the following:

- (a) Any person aggrieved by the decision of the director in the administration or application of this chapter, may, within thirty days after the date of the director's written decision, appeal the decision to the board of appeals.
- (b) A person is aggrieved by a decision of the director if:
  - (1) The person has an interest in the subject matter of the decision that is so directly and immediately affected, that the person's interest is clearly distinguishable from that of the general public: and

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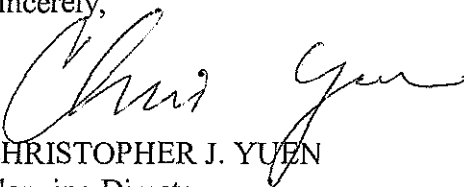
- (2) The person is or will be adversely affected by the decision.
- (c) An appeal shall be in writing, in the form prescribed by the board of appeals and shall specify the person's interest in the subject matter of the appeal and the grounds of the appeal. A filing fee of \$250 shall accompany any such appeal. The person appealing a decision of the director shall provide a copy of the appeal to the director and to the owners of the affected property and shall provide the board of appeals with the proof of service.
- (d) The appellant, the owners of the affected property, and the director shall be parties to an appeal. Other persons may be admitted as parties to an appeal. Other persons may be admitted as parties to an appeal, as permitted by the board of appeals.

The board of appeals may affirm the decision of the director, or it may reverse or modify the decision, or it may reverse or modify the decision or remand the decision with appropriate instructions if based upon the preponderance of evidence the board finds that:

- (1) The director erred in its decision; or
- (2) The decision violated this chapter or other applicable law; or
- (3) The decision was arbitrary or capricious or characterized by and abuse of discretion or clearly unwarranted exercise of discretion.

In view of the above, we have enclosed GENERAL PETITION FOR APPEAL OF DECISIONS BY PLANNING DIRECTOR.

Sincerely,



CHRISTOPHER J. YUEN  
Planning Director

WRY/DSA:cd

P:\WP60\WRY\FORMLETT\VAR07-002ZCSETBACKDENIALTMK15087012.NISHIMURA-RAMSEY

Enclosure-BOA Application

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xc: Real Property Tax Office-Hilo (w/o Enc.)  
Zoning Inspector-PD-Hilo (w/o Enc.)  
DPW-Building Division-Building Inspector (w/o Enc.)  
Patrick J. Duddy (w/o Enc.)