

William P. Kenoi  
Mayor



BJ Leithead Todd  
Director

Margaret K. Masunaga  
Deputy

## County of Hawai'i

### PLANNING DEPARTMENT

Aupuni Center • 101 Pauahi Street, Suite 3 • Hilo, Hawai'i 96720  
Phone (808) 961-8288 • Fax (808) 961-8742

June 8, 2011

Mr. Arthur W. Bethke  
PO Box 2000  
Pahoa, HI 96778

Dear Mr. Bethke:

**SUBJECT: VARIANCE APPLICATION – VAR 08-021**  
**Applicant: ARTHUR W. BETHKE**  
**Owners: ARTHUR W. BETHKE ET AL**  
**Request: Variance from Chapter 25, Zoning, Article 5, Division 7**  
**Section 25-5-7, Minimum Yards, (a), Section 25-5-8**  
**Other regulations, and Article 4, Division 4**  
**Section 25-4-44, Permitted projections into yards and**  
**open space requirements**  
**TMK: 1-4-026:009; Lot 17**

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After reviewing your variance application, the Planning Director certifies the **approval** of Variance No. 08-0021 (VAR 08-021) subject to variance conditions. The variance permits portions of the 2-story duplex structure and attendant open deck/roof eaves being built on subject property, Lot 17, to remain with a minimum 9.08 feet side yard setback in lieu of the required minimum space needed 10 feet side yard setback. It also allows for the flag pole **"IRON TOWER"** (accessory building) built within the 20 feet rear yard setback to remain on the subject property. The variance is from the subject property's minimum side yard and rear yard pursuant to the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 7, Section 25-5-7, 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).

### BACKGROUND AND FINDINGS

1. **Location.** The subject property, consisting of approximately 10,565 square feet of land, is situated within the Kapoho Beach Lots Subdivision, Extension 1, Puna, Hawai'i. The subject property's street address is 14-4713 Malulani Circle. The

subject property is zoned Single Family Residence – 10,000 square feet (RS-10) by the County and designated Urban or "U" by the State Land Use Commission (LUC).

2. **Variance Application.** The owner's representative submitted the variance application, attachments, and filing fee on March 28, 2008 and other submittals related to the variance request. The variance application's site plan map is drawn to scale and prepared by The Independent Hawaii Surveyors, LLC. The site plan dated March 19, 2008, denotes the position of the dwelling upon the subject property and portion constructed into minimum 10-foot wide side yard setback and minimum 5-foot wide side yard open space. Supplemental information from The Independent Hawaii Surveyors dated March 25, 2008, identifies the roof had been altered and now meets setbacks.
3. **County Records.** Hawaii County Real Property Tax Office records indicate that a building permit (851610) was issued to the subject property for the construction of a two-story, duplex dwelling consisting of 2 bedrooms, 1-bath with living, dining, kitchen and carport on the first level, with the second level consisting of 2 bedrooms, 1-bath with living room, dining and kitchen which remains under construction. An Ohana Dwelling Permit (OD 84-37) was approved on April 2, 1984 to allow for a two-story duplex.
4. **Agency Comments and Requirements:**
  - a. The State Department of Health (DOH) memorandum dated September 2, 2008 states:

"The Health Department found no environmental health concerns with regulatory implications in the submittals."
  - b. The Department of Public Works (DPW) response dated September 10, 2008 states:

"The owner(s) is to apply for a building permit for all illegal additions/alteration to the dwelling within three months of variance approval. This includes, but is not limited to, decks, garage and the third level."
5. **Notice to Surrounding Property Owners.** A copy of first notice and second notice sent by the applicant via USPS to surrounding property owners and mailing certificates were submitted to the Planning Department. According to these submittals the first and second notices were mailed via the USPS on April 1, 2008

and September 4, 2008, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on August 31, 2008.

6. **Comments from Surrounding Property Owners or Public.** The following written comments from surrounding property owners were received by the department:
  - a. No objection letter dated April 5, 2008 from Virgil James Wilson, III. Recommends setting a completion date for the duplex structure.

### **SPECIAL AND UNUSUAL CIRCUMSTANCES**

The applicant/owner submitted the variance application to address and/or resolve the dwelling encroachments within the property's minimum 10 feet side yard. The variance application's site plan denotes the location of the dwelling upon "Lot 17". Pursuant to the applicant background information, the owners had contracted McMurray Contracting to build the dwelling. Soon after the exterior of the dwelling was completed, Mr. McMurray died of cancer. The owner was unaware of any encroachments into the minimum side yard setback. No evidence has been found to show indifference or premeditation by the builder to intentionally construct a portion of the 2-story duplex dwelling into the property's minimum 10 feet side yard setback and attendant minimum 5 feet side yard open space required by the Zoning Code. Furthermore, the presence of the flag pole was not identified as a concern within the initial Notice of Violation and Order, dated December 19, 2007.

### **ALTERNATIVES**

Alternatives available to the current owners to correct and/or address the building encroachments constructed into the affected side yard, rear yard and open space of the subject property include the following actions:

Remove the building encroachments and/or redesigning or relocating the dwelling being constructed upon the subject property to fit within the correct building envelope denoted on the recent survey map as prescribed by the Zoning Code.

Consolidate the subject property with adjoining property and resubdivide the property to modify property lines and adjust minimum yard setbacks.

### **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.

It appears that the portion of the dwelling currently under construction was improperly situated on the subject property, which went undisclosed until the sale of this property was placed in escrow. The survey map prepared for the landowner shows the extent of the encroachment within the minimum side yard and its open space requirement. It appears that the dwelling, in its current location, is not physically and/or visually obtrusive from other properties situated within the immediate area. This can be substantiated, to some degree, by the fact that this office did not receive any complaint from surrounding property owners during the roughly 23-plus years this home has been under construction. A landowner located approximately two lots south of the subject property did not express an objection but recommended that a time limit of 12 to 18 months be set for the completion of the dwelling. Therefore, it is felt that the portions of the dwelling constructed into the affected side yard denoted on the variance application's site plan map will not detract from the character of the immediate neighborhood or the subdivision.

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. Furthermore, 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.

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

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 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/owners, their successors or assigns, officers, employees, contractors, or agents under this variance or relating to or connected with the granting of this variance.



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3. Portions of the two-story dwelling being built upon the subject property ("LOT 17") will not meet the minimum side yard pursuant to Chapter 25, the Zoning Code, according to the variance application's site plan map dated March 19, 2008. The approval of this variance permits portions of the 2-story Duplex Dwelling (under construction) and flag pole to remain upon subject property.
4. The applicant, its successors or assigns shall complete improvements according to Building Permit 851610 and/or in accordance with any other building permit(s) issued to subject property by the DPW-Building Division (Hilo) within one year from the date of this Variance
5. Should the dwelling (footprint) upon the subject property constructed pursuant to building permit 851610 be destroyed by fire or other natural causes, the replacement or new dwelling shall comply with the County Zoning Code and be subject to State law and County ordinances and regulations pertaining to building construction and building occupancy.
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 proceed to declare subject Variance, VAR 08-021, null and void.

Sincerely,



BJ LEITHEAD TODD  
Planning Director

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xc: Real Property Tax Office (Hilo)  
Robert Usagawa, Zoning Inspector