

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

**CERTIFIED MAIL**  
**7009 3410 0001 3138 0860**

July 5, 2011

Mr. David Jwanisik  
32 Kioea Street  
Hilo, HI 96720

Dear Mr. Jwanisik:

**SUBJECT: Application: VARIANCE PERMIT - VAR 09-060**  
**Applicant: DAVID JWANISIK**  
**Owner: DAVID JWANISIK**  
**Request: Variance from Chapter 25, Zoning**  
**TMK: (3) 2-1-017:044**

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After reviewing your variance application, the Planning Director certifies the **denial** of Variance 09-060. The variance application seeks approval to allow an addition to the single-story single family home and associated eaves to remain within the front yard setback at a minimum of 10.29 feet to the house and at a minimum of 8.92 feet to the eaves/roof, in lieu of the minimum 30-foot front yard and attendant minimum 24-foot front yard open space requirement along Kioea Street. The variance is from Hawai'i County Code, Chapter 25, Zoning, Article 5, Division 1, Section 25-5-7, Minimum yards (2)(A), and Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open space requirements, (a)(b).

The Planning Director has concluded that the variance from the above-referenced zoning standards be **denied** based on the following findings:

## **BACKGROUND**

1. **Location.** The subject property measures approximately 17,936 square feet and is identified as Lot 98 Lehia Park Residence Lots Second Series, Waiuli, Waiakea, South Hilo, Hawai'i. The property is located at the northwest corner of Nene Street and Kioea Street, and is addressed as 32 Kioea Street.
2. **Zoning.** The subject property is zoned Single Family-Residence – 15,000 square feet (RS-15) by the County and designated Urban (“U”) by the State Land Use Commission (LUC).
3. **Zoning Code Violation.** The County issued a Notice of Violation and Order (ZCV 2008-056E) to the owner on September 23, 2008. The NOV included the identification that the property, fronting on two streets, is considered as having two front yard setbacks. The property’s zoning generally necessitates 20-foot front yard setbacks; however an additional 10-foot setback is required for road widening along Kioea Street and another 15-foot setback for road widening along Nene Street.
4. **Variance Application.** The applicant/owner submitted the initial variance application and associated materials on or about April 7, 2009. The variance application concerns a request to allow portions of the home and associated eave overhangs to remain within the front-yard setback and open space. The applicant’s narrative explanation inaccurately identified the setbacks for the property; listing them as a 20-foot front-yard setback on Nene Street and an 8-foot side-yard setback on Kioea Street.

Supplemental information has since been provided for consideration including, but not limited to, a revised site survey dated July 23, 2009 from The Independent Hawaii Surveyors, LLC. This confirms the location of rock walls constructed by the applicant within the public rights-of-way as well as an approximate 400 square foot home addition constructed by the applicant into the 30-foot front-yard setback along Kioea Street. The original home was constructed in 1957 (prior to the county’s adoption of the zoning code) and, despite being within the front yard setback, is considered as legal-non-conforming (“grandfathered”).

5. **Agency Comments and Requirements.**
  - a. The State of Hawaii Department of Hawaiian Home Lands (DHHL) memo, dated April 28, 2009, identifies the presence of a stone walls constructed by the applicant within DHHL right-of-way (refer to memo in VAR file). Subsequently, the applicant has removed the wall encroachments in both the

Nene Street and Kioea Street ROWs as well as landscaping (referenced as seven 12-foot palms). The county appreciates the applicant's work in removing the encroachments within the rights-of-way, specifically since very few routes exist in this vicinity of Hilo for evacuation purposes.

- b. The State Department of Health (DOH) memo, dated February 3, 2011, identifies no environmental health concerns (refer to memo in VAR file).
  - c. Department of Public Works (DPW) – Building memo, dated February 8, 2011, identifies the existence of an active permit requiring action after variance determination by the Planning Director (refer to memo in VAR file).
  - d. No comments were received from the Department of Public Works (DPW) – Engineering Division.
6. **Notice to Surrounding Owners/Posted Sign.** The applicant submitted a copy of a public notice, list of surrounding property owner(s), and other submittals. Pursuant to signed affidavits dated April 7, 2009 and February 14, 2011, the applicant mailed to surrounding property owners within 300 feet of the site the first and second notices. Notice of this application was published in the Hawai'i Tribune Herald and West Hawai'i Today on February 7, 2011.
7. **Comments from Surrounding Property Owners or Public.** A significant number of individuals submitted testimony on the request, all of which is being retained on file by the County Planning Department. Said testimony includes the following:

Supportive testimony:

Includes petitions and form letters provided from 39 parties. Staff would note that not all names or addresses provided were fully legible. A significant amount of testimony was submitted from individuals not located in close proximity to the property of interest, such as Pahoa, Keaau, Pepeekeo and Mountain View.

Opposition Testimony:

- Letter from Charles P. Doughty, Hilo, dated March 2, 2011.
- Letters from James McKeague, Hilo, dated February 23, 2011; February 14, 2011; October 14, 2010; April 16, 2009.
- Letters from Frank and Wendy Giroux. Hilo, dated February 15, 2011 and April 15, 2009.

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- Letter from Misae Wela, Hilo, dated October 23, 2009.
- Letter from Michele Zane-Faridi, Hilo, dated October 15, 2009.
- Letter from James and Anne Olson, Hilo, received April 30, 2009.

#### **ALTERNATIVES/SPECIAL AND UNUSUAL CIRCUMSTANCES**

Alternatives for resolving the encroachments into the front-yard setbacks include the following:

1. Remove the encroachments, or
2. Permit a Variance from zoning standards to allow the encroachments to remain.

The application asserts that there are special or unusual circumstances to justify the variance request. The applicant contends that the work he did for the home addition/modification should not be construed as starting construction before receipt of building permits, which is in conflict with the position taken by the Building Division whereby they imposed additional fees for construction without permits. Furthermore, the applicant contends the apparent lack of accuracy of the site plan and resulting placement of the home addition was the responsibility of the architect (Steve Fassett) and Building Inspector. DPW identifies the placement of a structure is the responsibility of the contractor, which in this case was the owner/builder. Planning staff contend that the ultimate responsibility of the property, including uses and what is constructed on one's property, lies with the property owner.

In review of the application materials, county records, and associated documentation the *Department finds no special or unusual circumstances justifying the variance*. The subject property, measuring nearly 18,000 square feet, is relatively flat and presents ample buildable area despite the presence of two front yard setbacks with road widening easements.

The plot plan that accompanied the building permit for the home addition was approved by the Planning Department on November 8, 2001. Said plot plan greatly misrepresented the orientation of the house in relation to the property boundaries. Furthermore, the plot plan *did* identify front-yard setbacks on both streets as well as a 10-foot wide road easement along Kioea Street. However in the variance application, the owner/applicant inaccurately describes the setback along Kioea as being 8 feet in width. Likewise, in the initial site survey provided with the original variance materials, no road widening easements were identified.

## **INTENT AND PURPOSE - ROAD VARIANCE**

The intent and purpose of requiring building setbacks within a subdivision or development are to assure that adequate air circulation and exposure to light are available between permitted structures, uses and boundary/property lines. The necessity of setbacks in the situation of this variance, request further concerns to road widening for general public use.

After reviewing the variance application, County records, and other documentation, the Planning Director finds that the addition to the single family residence within the setback was self-created. Based on the background information and other materials referenced in this variance analysis, the variance to allow the encroachment *would not 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.

The subject variance application was received by the department on or about April 7, 2009 then deferred on August 6, 2009, pending additional information and resolution on certain issues. The application was subsequently acknowledged on February 1, 2011 in anticipation of a variance decision being rendered by May 6, 2011. Additional time was necessary for the department to complete the analysis and render a decision.

## **VARIANCE DECISION-CONDITIONS**

The variance application, VAR 09-060, concerning the applicant's request to allow portion of the single family structure built into the front yard setback and open space setback along Kioea Street, is hereby **denied** and the following conditions are hereby imposed:

### **Conditions:**

1. The applicant shall remove the approximate 400-square foot addition constructed on the northeast portion of the single family residence that is located within the setbacks within six (6) months of the date of this decision, by Friday January 6, 2012.
2. The applicant shall obtain all necessary permits, or complete necessary work to finalize prior permits that have not been closed, from the Department of Public Works – Building Division for said removal of the addition and for other structures present on the property.

If the above conditions have not been met by referenced date, the Department may proceed with enforcement actions against the owner which could include fines or placement of a lien against the property.



In accordance with Ordinance No. 99-112, you may appeal the director's decision as follows:

- (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
  - (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 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 an abuse of discretion or clearly unwarranted exercise of discretion.

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In view of the above and for your reference, we have enclosed the GENERAL PETITION FOR APPEAL OF DECISIONS BY PLANNING DIRECTOR form.

Sincerely,



BJ LEITHEAD TODD  
Planning Director

GES:LHN:nci  
P:\Admin Permits Division\Variance\2009 Files\VAR 09-060 Jwanisik\Decision.doc

Enclosure: BOA Application

xc: DPW – Building Division (w/o enclosure)  
Real Property Tax Office (Hilo) (w/o enclosure)  
Zoning Inspector (w/o enclosure)

**COUNTY OF HAWAII  
BOARD OF APPEALS**

**GENERAL PETITION FOR APPEAL OF DECISIONS BY PLANNING DIRECTOR**

(Type or legibly print the requested information)

APPELLANT: \_\_\_\_\_

APPELLANT'S SIGNATURE: \_\_\_\_\_ DATE: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

TELEPHONE: (Bus.) \_\_\_\_\_ (Home) \_\_\_\_\_

APPELLANT'S INTEREST IN THE PROPERTY: \_\_\_\_\_

APPELLANT'S NATURE OF APPEAL AND REQUEST: \_\_\_\_\_

LAND OWNER: \_\_\_\_\_

TAX MAP KEY: (land in question) \_\_\_\_\_ AREA OF PROPERTY: \_\_\_\_\_

STATE LAND USE DESIGNATION: \_\_\_\_\_ COUNTY ZONING: \_\_\_\_\_

STREET ADDRESS OF PROPERTY: \_\_\_\_\_

APPELLANT'S REPRESENTATIVE: \_\_\_\_\_

REPRESENTATIVE'S SIGNATURE: \_\_\_\_\_ DATE: \_\_\_\_\_

REPRESENTATIVE'S ADDRESS: \_\_\_\_\_

TITLE: \_\_\_\_\_ TELEPHONE: (Bus.) \_\_\_\_\_

THIS PETITION MUST BE ACCOMPANIED BY A FILING FEE OF TWO HUNDRED FIFTY DOLLARS (\$250) PAYABLE TO THE COUNTY DIRECTOR OF FINANCE AND:

1. The Original and ten (10) copies of this completed petition with the following:
  - a. A description of the property involved in the appeal in sufficient detail for the public to precisely locate the property.
  - b. A statement explaining the nature of the appeal and the relief requested.
  - c. A statement explaining:
    - (i) How the decision appealed from violates the law; or
    - (ii) How the decision appealed from is clearly erroneous; or
    - (iii) How the decision appealed from was arbitrary or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.
  - d. A clear and concise statement of any other relevant facts.
2. Proof of Service by the Appellant on the Planning Director for an appeal from the Planning Director's decision relating to the Zoning Code.
3. A list of the names, address and tax map keys of all owners of property within boundaries established by Section 8-11(d) of the Board of Appeals Rules of Practice and Procedure.



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Attorneys for BOARD OF APPEALS, COUNTY OF HAWAI'I

BEFORE THE BOARD OF APPEALS

COUNTY OF HAWAI'I

DAVID JWANISIK,  
  
Appellant,

vs.

BJ LEITHEAD TODD  
PLANNING DIRECTOR  
COUNTY OF HAWAI'I

Appellees.

BOA No. 11-000114  
Appeal of Planning Director's September 6,  
2011 Decision Denying Setback Variance  
TMK: (3) 2-1-017:044

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND DECISION AND ORDER;  
CERTIFICATE OF SERVICE

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER**

The Board of Appeals of the County of Hawai'i (hereinafter "Board") considered this General Petition For Appeal Of Decisions By Planning Director relating to the Planning Director's decision to deny Variance 09-060, received by the Planning Department on September 30, 2011, at duly noticed hearings on March 8, 2013, May 10, 2013 and July 12, 2013. Appellant DAVID JWANISIK (hereinafter "Appellant") was represented *pro se* during the March 8, 2013 and May 10, 2013 hearings and by Claudia Rohr during the

July 12, 2013 hearing. Appellee BJ LEITHEAD TODD PLANNING DIRECTOR COUNTY OF HAWAI'I (hereinafter "Director") was represented by Deputy Corporation Counsel Amy G. Self.

The Board, having considered the entire record in this matter, makes the following Findings of Fact, Conclusions of Law and Decision and Order.

## **FINDINGS OF FACT**

### **Background Facts**

1. Appellant is the owner of a 17,936 square feet lot located at 32 Kioea Street in Waiākea, Keaukaha, Hilo, Hawai'i, at the corner of Kioea Street and Nene Street, and designated as Tax Map Key No.: (3) 2-1-017:044 (hereinafter referred to as the "Property"). Record on Appeal ("ROA") at 16, 30, 225.
2. The Property lies within the State Land Use "Urban" district and the County's Single-Family Residential (RS-15) zoning district. ROA at 16, 30.
3. Because the Property fronts two streets, Kioea Street and Nene Street, it is classified as a "Corner Lot" and, therefore, has two front yards with the remaining interior lot lines being "side" yard lot lines. ROA at 16, 31.
4. The minimum yard setback requirements for the size of the Property are: twenty (20) feet for front and rear yards and ten (10) feet for side yards. ROA at 16, 31.
5. In addition, Ordinance No. 187, Section 7.29 designates a ten foot (10) road widening easement along Kioea Street and a fifteen (15) foot road widening easement along Nene Street, making the front yard setback requirement along Kioea Street thirty (30) feet rather than twenty (20) feet and the required front yard setback along Nene Street thirty-five (35) feet rather than twenty feet. ROA at 4, 16, 31, 138, 207, 243; Appellant's Exhibit 3 at 2.
6. According to the County of Hawai'i Real Property Tax records, the original

single-family dwelling structure located on the Property was built in 1957 (prior to the County's adoption of the zoning code) and, despite a portion of the structure being situated within the front yard setback, is considered as legal non-conforming (or "grandfathered"). ROA at 17, 74, 174, 243.

7. Appellant purchased the Property in 1992 with the existing single-family dwelling built in 1957. ROA at 74.

8. Sometime in 2001, Appellant applied to the Department of Public Works ("DPW") Building Division for a building permit as "Owner-Builder," pursuant to section 444-2(7) of the Hawai'i Revised Statutes ("HRS"), for a 342 square foot addition to his existing house to include a new bedroom, bathroom and hallway (hereinafter referred to as the "New Addition"), and to convert the existing garage to a family room. ROA at 5, 17, 58, 137, 225; Board of Appeals Hearing Transcript dated March 8, 2013 (hereinafter "TR 3/8/13") at 27 – 28.

9. Both the Building Permit Application, signed by Appellant on November 8, 2001 as Owner-Builder, and the Site Plan (hereinafter referred to as "Original Site Plan") submitted with the Building Permit Application contained the following statement: "BUILDER SHALL ASSURE PROPER SETBACKS OF STRUCTURES TO PROPERTY LINES." ROA at 4, 137, 140; TR 3/8/13 at 27 – 28.

10. The Original Site Plan, which indicated a 30' minimum front yard setback required for the Kioea Street side of the structure and a 35' minimum front yard setback required for the Nene Street side of the structure, was stamped and signed by Steven A. Fassett, a licensed architect in Hawai'i, and approved by the DPW Engineering Division and the Planning Department on November 8, 2001. ROA at 4, 140; TR 3/8/13 at 24 – 27.

11. As the "Owner-Builder," Appellant was responsible for making sure the New Addition was constructed on the ground as it was depicted on the Original Site Plan approved by

DPW and the Planning Department. TR 3/8/13 at 28.

12. Prior to the issuance of Building Permit No. 011549 dated 12/04/01, Appellant was required to pay a double fee for work started on the improvements prior to obtaining a building permit. ROA at 58, 76, 77, 136-137, 225.

13. After the Planning Department (hereinafter "Department") received several complaints alleging Appellant constructed structures on the Property that may be encroaching into a required setback, the Zoning Inspector, Robert Usagawa, conducted a site inspection on May 22, 2008, but was forced to conduct his inspection from the County right-of-ways because of a "No Trespass" sign posted on the Property which stated the following:

NO TRESPASSING  
TRESPASSERS WILL BE SHOT ON SIGHT  
IF YOU ARE STILL ALIVE  
WE WILL RELOAD AND SHOOT YOU AGAIN.  
ALOHA WITH LOVE

ROA at 17, 29, 139.

14. During the site inspection, Mr. Usagawa compared what was actually on the ground to the "Floor Plan" and the Original Site Plan for Building Permit No. 011549 and a survey of the Property conducted on May 7, 2007 by DPW Engineering Division due to receiving a similar complaint in 2007 of the property owner constructing rock walls within the County right-of-ways. ROA at 4, 5, 12 - 17.

15. Based on his observations during the site inspection of the Property, Mr. Usagawa concluded that Appellant had constructed rock walls approximately twenty feet beyond the designated boundary line along Nene Street and approximately nine feet beyond the designated boundary line along Kioea Street, making it seem like the locations of the rock walls were the legal limits of the Property, which, in turn, gave the appearance that the New Addition was in conformance with the setback requirements. Since, however, the rock walls were found to be

encroaching into the County's right-of-ways, the inspector indicated that the New Addition to the dwelling may be encroaching into the minimum 30-foot yard setback along Kioea Street. ROA at 14, 17.

16. After the site inspection, Mr. Usagawa was told by the building inspector that the "Framing Inspection" was rejected by DPW and that Building Permit No. 011549 was "still alive." ROA at 14.

17. On or about May 28, 2008, the former Planning Director, Christopher J. Yuen, sent a memorandum to DPW requesting a "Delay" on the Final Inspection Approval for the New Addition on the Property until satisfactory completion of the alleged encroachment of the rock walls and the new addition. ROA at 13 - 14.

18. Also, on or about May 28, 2008, Mr. Yuen issued a "Warning Letter" to Appellant to give Appellant the opportunity to either disprove the violation complaint or to take corrective action by the deadline of June 30, 2008, to avoid the issuance of a formal Notice of Violation and Order. ROA at 15 - 19.

19. After not receiving a response to the Warning Letter by the June 30, 2008 deadline, the zoning inspector conducted a follow-up site inspection on August 29, 2008, confirming that the rock walls were intruding into the County's right-of-way, and a Notice of Violation and Order ("NOV") was issued on September 23, 2008. ROA at 30 - 36.

20. Based on the August 29, 2008 site inspection, the NOV stated that the Appellant was in violation of the County Zoning Code due to the placement of the new 10' x 20' bedroom, and possibly the new full bathroom and hallway, within the minimum 30-foot front yard setback required by the Zoning Code and Ordinance No. 187, Section 7.29, along Kioea Street. ROA at 17, 32, 243.



21. The NOV ordered Appellant to secure a licensed surveyor at his own expense to conduct a survey showing the placement of all structures and all their projections on the Property and submit the survey to the Department by November 1, 2008. ROA at 33.

22. If the survey showed intrusions into the required minimum setbacks, the NOV gave Appellant the option of either applying for a variance from the setback and clear space requirements of the Zoning Code (advising that submission of a variance application does not grant its tacit approval) or remove any portion of the structure that was intruding into the required yard setback. ROA at 33.

23. The NOV also provided Appellant an opportunity to request a time extension at least one week prior to the deadline date if Appellant could not complete the corrective action by November 1, 2008. ROA at 33.

24. On or about October 22, 2008 and October 23, 2008, Appellant requested an extension of time to complete the corrective action because he said he did not receive the NOV until October 10, 2008. ROA at 37 – 40, 48.

25. On or about November 6, 2008, the November 1, 2008 deadline for submitting a survey to the Department was extended to December 15, 2008 due to the surveyor retained by Appellant not being able to accomplish the survey until early December. ROA at 49 – 50.

26. On or about December 29, 2008, the deadline for submitting a survey to the Department was extended to January 30, 2009, in response to Appellant's request for a 45-day extension in order to "gather the funds for pay for [the] survey." ROA at 51 - 52.

27. On or about February 6, 2009, the Department received a survey of the Property, dated January 7, 2009, prepared by a licensed surveyor, Niels Christensen, but it did not include the required road widening easements. ROA at 54, 176.

28. On or about March 4, 2009, the Director issued a formal request to the surveyor for a “new survey map” after receiving no response when the zoning inspector called the surveyor’s office on February 9, 2009 to request a new survey map. ROA at 55 – 56.

29. On or about March 10, 2009, the Department received a revised survey map prepared by Niels Christensen dated February 9, 2009, which showed the placement of all structures and all its projections to the boundary lines on the Property. ROA at 57, 59 – 60.

30. On or about March 16, 2009, the Director provided a third time extension of the November 1, 2008 deadline for corrective action to again provide an opportunity for Appellant to submit an application for a variance from the Zoning Code to be submitted to the Department by April 15, 2009. ROA at 60.

#### Variance Application

31. On or about April 7, 2009, Appellant submitted an “Application For Variance From Zoning Code,” with the January 7, 2009 survey attached, for a variance from the Zoning Code minimum yard and clear space requirements regarding the New Addition. ROA at 54, 62, 64, 69.

32. By request of the Department, Appellant submitted a revised site plan dated July 23, 2009 denoting the minimum 10 feet future road widening setback line along Kioea Street and the minimum 15 feet future road widening setback line along Nene Street and including corrected minimum building lines or minimum front yards and minimum side yards required for the Property. ROA at 64, 243.

33. By letter dated August 6, 2009, the Department deferred processing the Variance Application for the following reasons: 1) Appellant was required to remove portions of the rock wall constructed within the County’s 40-foot right-of-way on Kioea Street and within the 50-foot right-of-way on Nene Street belonging to the State of Hawai‘i Department of Hawaiian Homes

Land on or before September 6, 2009; 2.a.) Appellant was required to submit a complete application, respond to any questions and send notice to surrounding property owners within 300 feet of the perimeter of the Property; 2.b.) Appellant was required to explain how the New Addition pursuant to Building Permit (“BP”) No. 011549 was severely misplaced upon the Property and explain the extreme discrepancies between the proposed location or position of the New Addition denoted on the Original Site Plan, reviewed and stamped by a Licensed Professional Architect in 2001 and approved for BP No. 011549, and the current or revised survey map, dated July 23, 2009, denoting approximately 75% or more of the New Addition being built into the Property’s minimum 30 feet front yard and associated minimum open yard space along Kioea Street; and 3) to give the Department an opportunity to confer with DPW to review the status and building history for BP No. 011549 and any misrepresentations regarding the Original Site Plan and other plans submitted for the Property. ROA at 64 – 67.

34. On or about September 3, 2009, Appellant responded by letter to the Director’s August 6, 2009 letter indicating that all portions of the rock wall were removed as requested by August 6, 2009 and that he believed the New Addition “accidentally was misplaced on the property from what was drawn on the site plan” because his “Architect did not hire a surveyor to conduct a survey as he promised [ ] he would in order that the addition would be positioned properly behind all of the setbacks and any future road widening.” ROA at 74 – 75.

35. By letter dated February 1, 2011, the Director notified Appellant that the Director had tentatively set the date to render a decision on the Variance Application on or before May 6, 2011; however, additional time was verbally approved by Appellant and necessary for the Department to complete the analysis and render a decision. ROA at 83 – 84, 177.

36. By letter dated July 5, 2011, the Director denied Appellant’s Variance Application finding “no special or unusual circumstances justifying the variance” because the

Property, “measuring nearly 18,000 square feet, is relatively flat and presents ample buildable area despite the presence of two front yard setbacks with road widening easements.” ROA at 173, 176.

37. In further support of the denial of the Variance Application, the Director stated that the Original Site Plan “greatly misrepresented the orientation of the house in relation to the property boundaries” and that although the Original Site Plan identified the front-yard setbacks on both streets as well as a 10-foot wide road easement along Kioea Street, Appellant inaccurately described the setback along Kioea as being 8 feet in width and the initial survey submitted with the Variance Application did not identify the road widening easements. ROA at 176.

38. As a condition of the decision on the Variance Application, the Appellant was required to remove the New Addition that is located within the setbacks by January 6, 2012 and obtain all necessary permits, or complete necessary work to finalize prior permits that have not been closed, from DPW Building Division for removal of the New Addition and for other structures present on the Property. ROA at 177.

39. By letter dated July 18, 2011, Appellant’s representative at that time, Lori Mikkelson, requested a reconsideration of the decision on the Variance Application, a meeting with the Director, and an extension of the 30 day limit for filing an appeal. ROA at 183-184.

40. By letter dated August 2, 2011, Ms. Mikkelson pointed out that there were letters in support of Appellant’s Variance Application missing from the Department’s file regarding the Property. ROA at 185 – 187.

41. By letter dated August 3, 2011, the Director granted the request for reconsideration of the decision on the Variance Application and suspended the July 5, 2011

decision for a 30-day period to consider Ms. Mikkelson's comments and ascertain whether there was missing documentation from the Department's file. ROA at 189.

42. After again reviewing the Variance Application and the additional testimony uncovered, which included both supportive and opposition testimony, the Director confirmed the denial of Appellant's Variance Application by letter dated September 6, 2011 for the same reasons stated in the July 5, 2011 decision. ROA at 206 – 215.

43. In addition to the reasons stated in the July 5, 2011 decision, the Director found that the New Addition to the single family residence within the setback was "self-created" because the Original Site Plan approved by the Department on November 8, 2001 "greatly misrepresented the orientation of the house in relation to the property boundaries" and the Variance Application narrative and initial survey submitted to the Department in early 2009 "misrepresented the setbacks," even though the 2008 NOV reminded the Appellant of the setbacks and apparent construction of the New Addition within the setbacks. ROA at 212 – 213.

#### The Appeal

44. On or about September 30, 2011, Appellant filed a timely "General Petition For Appeal Of Decisions By Planning Director" (hereinafter referred to as the "Appeal") represented by Lori Mikkelson of All Aina Services. ROA at 219 – 246.

45. The narrative of the Appeal blames Appellant's architect and a DPW building inspector for the encroachment of the New Addition into the required setbacks, but Appellant testified during the hearing on the Appeal that as the "Owner-Builder," he was responsible for making sure the New Addition was constructed on the ground as it was depicted on the Original Site Plan approved by DPW and the Planning Department. ROA at 228; TR 3/8/13 at 28.

46. Appellant also testified that he relied on his architect to position the New Addition properly and wasn't aware of the problem with the setbacks. TR 3/8/13 at 29.



47. Based on Appellant's late submittal of Exhibit 1, "Outline of Testimony," and the willingness of the Director to look further into Appellant's claim to try to determine whether Appellant had sufficient knowledge of the position of the New Addition or whether he truly relied solely on the representation of his architect as he claimed, the Board continued the hearing to give Appellant an opportunity to meet with the Director to try to resolve the issue before the next meeting of the Board. TR 3/18/13 at 30 – 33.

48. During the continued hearing before the Board on May 10, 2013, the Director testified that when she went out to the Property and looked at how the house was positioned on the ground, she determined that there was no way the Appellant could have believed that the Original Site Plan was correct because the house was "built at a diagonal." Board of Appeals Hearing Transcript dated May 10, 2013 ("TR 5/10/13") at 15.

49. The Director further testified that the July 23, 2009 schematic prepared by Niels Christensen correctly reflects the alignment of the house as it appears on the ground and that even without the required road widening easement, the New Addition intrudes 5 feet into the 20-foot setback required in the Zoning Code. TR 5/10/13 at 14 – 15; ROA at 243..

50. Based upon her observation of the physical alignment of the house and New Addition on the Property and her review of the Variance Application, the Director again determined that the proposed Variance failed to meet the criteria on which a variance must be based, pursuant to Section 25-2-51 of the Hawai'i County Code, because there were no special or unusual circumstances that apply to the Property since the Property had sufficient room for Appellant to build the New Addition without going into the setback areas. TR 5/10/13 at 16 – 17.

## RULINGS ON FINDINGS OF FACT

Any of the findings of fact submitted by Appellant not already ruled upon by the Board by adoption herein, or rejected by clearly contrary findings of fact herein, are hereby denied and rejected.

Any conclusion of law herein improperly designated as a finding of fact shall be deemed or construed as a conclusion of law; any finding of fact herein improperly designated as a conclusion of law shall be deemed or construed as a finding of fact.

## CONCLUSIONS OF LAW

1. The Board has jurisdiction to hear and determine this appeal pursuant to Section 6-9.2 of the Hawai'i County Charter (2012 Edition), Section 25-2-20 of the Hawai'i County Code, and Part 8 of the County of Hawai'i Board of Appeals Rules of Practice and Procedure ("Board's Rule(s)").

2. Rule 8-15A of the Board's Rules, entitled "General Standards for Appeals (Zoning Code)" provides that:

In appeals of decisions of the director made under the Zoning chapter of the Code, the Board of Appeals may affirm the decision of the director 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 the Zoning chapter of the Code or other applicable law; or
- (3) The decision was arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

3. The number of votes necessary to validate any action of the Board is four. *See* Board's Rule 1-5(g).

4. Appellant has “the burden of proof, including the burden of producing evidence as well as the burden of persuasion.” “HRS § 91-10(5). “The degree or quantum of proof shall be a preponderance of the evidence.” *Id.*

5. “[T]he preponderance standard directs the factfinder to decide whether the existence of the contested fact is more probable than its nonexistence.” *Minnich v. Admin. Dir. Of Courts*, 109 Hawai‘i 220, 229, 124 P.3d 965, 974 (2005) (citation omitted).

6. The Director is also granted a presumption of validity as to her decisions. *See Morgan v. Planning Dept.*, 104 Hawai‘i 173, 179, 86 P.3d 982, 988 (2004) (citation omitted) (“It is well-established that the decisions of administrative agencies acting within the realm of their expertise are accorded a presumption of validity, and, therefore, the appellant carries a heavy burden of convincing the court that the decision is invalid because it is unjust and unreasonable in its consequences.”).

7. The Director is the chief planning officer of the county and the administrative head of the Planning Department. Hawai‘i County Charter § 6-7.2(b).

8. One of the Director’s responsibilities is to administer the zoning ordinances and regulations adopted thereunder. Hawai‘i County Charter § 6-7.2(b)(5).

9. A variance from the Zoning Code may be granted by the Director only if the following is found:

- (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 that property; and
- (b) There are no other reasonable alternatives that would resolve the difficulty; and

- (c) The variance is consistent with the general purpose of the district, the intent and purpose of this [Zoning Code], 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.

Hawai'i County Code § 25-2-51(a) – (c).

10. There were no special or unusual circumstances on the Property to meet the criteria for a variance from the Zoning Code because there was sufficient room for Appellant to build the New Addition on the Property without going into the setback areas required under Section 25-5-7(2) of the Zoning Code and the road widening easement required under Section 7.29 of Ordinance No. 187.

11. Even without the required road widening easement, the Variance Application did not meet the criteria for a variance from the Zoning Code because the New Addition intrudes 5 feet into the 20-foot setback required under Section 25-5-7(2) of the Zoning Code.

12. A variance to allow the encroachment into the yard setback under such circumstances would not be consistent with the general purpose of the zoning district and the intent and purposes of the Zoning Code, Subdivision Code and the County General Plan.


13. As the "Owner-Builder," Appellant was responsible for assuring the New Addition was properly positioned on the Property and, by not doing so, Appellant created his own problem with the New Addition being built within the setbacks.

14. When the Director denied Appellant's Variance Application, the Director did not err in her decision, her decision did not violate the Zoning chapter of the Code or other applicable law, and her decision was not arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

## DECISION AND ORDER

Upon a duly considered motion passed by a vote of six ayes and zero noes, the Board of Appeals hereby affirms the decision of the Director to deny the Variance Application because the Appellant failed to meet his burden of proof that, according to Rule 8-15A of the Board's Rules, (1) the director erred in its decision; or (2) the decision violated the Zoning chapter of the Code or other applicable law; or (3) the decision was arbitrary or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. Based on the substantial evidence in the Record, and the Findings of Fact and Conclusions of Law stated herein, the Board of Appeals finds and concludes that the Planning Director properly denied the Appellant's Variance Application. Therefore, the appeal by Appellant David Jwanisik of the Director's decision denying the Variance Application is hereby denied, with all parties to bear their own fees and costs incurred in this proceeding.

Dated: Kailua-Kona, Hawai'i, November 21, 2013

  
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RODNEY WATANABE, Chairperson  
Board of Appeals of the County of Hawai'i



William P. Kenoi  
Mayor



Duane Kanuha  
Director

Bobby Command  
Deputy Director

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**County of Hawai'i**  
PLANNING DEPARTMENT

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Phone (808) 961-8288  
Fax (808) 961-8742

**CERTIFIED MAIL**  
**7011 1570 0001 5772 8426**

December 9, 2013

Mr. David Jwanisik  
32 Kioea Street  
Hilo, HI 96720

Dear Mr. Jwanisik,

**SUBJECT: Request for Modification to County of Hawai'i Facilities, Programs or Services in Compliance with the Americans with Disabilities Act (ADA)**

I have been informed by Ms. Terri Spinola-Campbell, Equal Opportunity Officer/ADA Coordinator, through confidential memorandum dated December 2, 2013, that your request for modification involving a County of Hawai'i program submitted on August 21, 2013 has been determined to be reasonable, and therefore this office has been directed to comply with the ADA and do what is necessary to grant you the modification you have requested.

The ADA, Subpart B Sec 35.130 states:

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity.

The County ADA Coordinator further determined that zoning is a County program which is subject to this provision of the ADA. You have been determined to be a qualified individual with a disability; and your request for reasonable modification has not been found to fundamentally alter the nature of the subject County program.

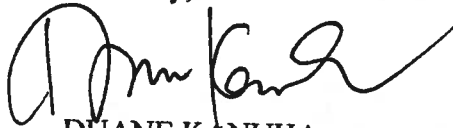
You had initially submitted a variance request for relief from zoning setback and future road widening setback requirements for an addition to an existing dwelling situated at 32 Kioea Street. That request was denied by the former Planning Director and upon appeal to the Hawai'i County Board of Appeals, was sustained by that board.

Mr. David Jwanisik  
December 9, 2013  
Page 2

The subject addition was originally intended for use by your parents but is now being requested to be used by yourself due to mobility disability which occurred during the proceedings. The constructed addition has the lowest point of entry (step) that you are able to use now and would also permit you to build a wheelchair accessible ramp later on as your condition deteriorates.

This letter is to advise you that I intend to fully comply with the findings, conclusion, and determination by the ADA Coordinator and will finalize the documentation granting you the reasonable accommodation request within the next ten (10) working days.

Sincerely,

A handwritten signature in black ink, appearing to read "Duane Kanuha". The signature is fluid and cursive, with a large initial "D" and a long, sweeping tail.

DUANE KANUHA  
Planning Director

c Bill Brilhante, Deputy Corporation Counsel  
Terri-Spinola Campbell