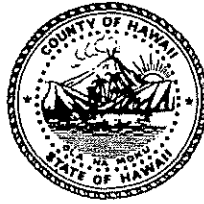


William P. Kenoi  
Mayor



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

July 27, 2010

Mr. Niels Christensen  
The Independent Hawaii Surveyors, LLC  
P. O. Box 577  
Hilo, Hawai'i 96721

Dear Mr. Christensen:

**SUBJECT: VARIANCE-VAR 10-005**

**Applicant: THE INDEPENDENT HAWAII SURVEYORS, LLC**

**Owners: MOSES A. AND AMBER L. MAKUAKANE**

**Request: Variance from 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**

**TMK: 1-3-023:062 (Lot 1)**

After reviewing your variance application, the Planning Director certifies the **approval** of Variance No. 10-005 (VAR 10-005), subject to the following conditions. The variance will allow portion of the detached water tank to remain on the subject property with a minimum 5.39 feet side yard setback and attendant minimum 5.39 feet side yard open space in lieu of the minimum 20.0 feet side yard(s) and attendant minimum 14.0 feet side yard open space requirement. The variance is from the subject property's minimum side yard requirement pursuant to the Hawai'i 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).

**JUL 28 2010**

## BACKGROUND AND FINDINGS

1. Location. The subject property consists of 1 Acre in land area and is situated within the Leilani Estates Subdivision, Puna, Hawai'i. The subject property's street address is 13-3495 Makamae Street. The subject property is zoned Agricultural – 3 Acre (A-3a) by the County and designated Agricultural, or "A," by the State Land Use Commission (LUC).
2. Variance Application-Site Plan. The applicant, on behalf of the owners, submitted the variance application, attachments, and filing fee on February 23, 2010, and other submittals related to the variance request and variance application. The variance application's site plan map is drawn to scale and prepared by Niels Christensen, L.P.L.S. (The Independent Hawaii Surveyors, LLC). The variance site plan map, dated September 29, 2009, denotes the position of the detached Water Tank constructed into minimum 20-foot wide side yard setback requirements.
3. County Building Records:  
  
Hawai'i County Real Property Tax Office records indicate that a building permit (932685) was issued to the subject property for a one-story, single-family dwelling consisting of 3 bedrooms, 2 bathrooms, living room, kitchen and dining area, garage/storage, and galvanized steel water tank.
4. Variance Application (VAR10-005)-Agency Comments and Requirements:
  - a. The State Department of Health (DOH) memorandum dated May 11, 2010, states:  
  
"The Health Department found no environmental health concerns with regulatory implications in the submittals."
  - b. The Department of Public Works (DPW) had no comments, memo dated June 3, 2010.
5. Notice to Surrounding Property Owners. A copy of first and second notice sent by the Applicant via USPS to surrounding property owners and mailing certificates was submitted to the Planning Department. According to these submittals, the first and second notices were mailed via the USPS on April 22, 2010, and May 21, 2010, respectively. A second notification to additional surrounding property owners was sent out on July 1, 2010. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on May 13, 2010.

6. Comments from Surrounding Property Owners or Public. No further written agency comments were received. No written comments or objections from surrounding property owners of the general public were received.

#### SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant/owner submitted the variance application to address and/or resolve the single family residence and detached water tank encroachments within the property's minimum 20 feet side yard. The variance application's site plan denotes the location of the water tank upon "Lot 1". Pursuant to the applicant's background information, the owners were unaware of any encroachment when they purchased the property and would not have discovered any problems affecting the single-family dwelling and detached water tank until a modern survey was conducted on September 29, 2009 by Hawaii Independent Surveyors, LLC, revealing the setback violations. No evidence has been found to show indifference or premeditation by the builder to intentionally construct a portion of the detached water tank into the property's minimum 20 feet side yard setback and attendant minimum 14 feet side yard open space required by the Zoning Code.

#### ALTERNATIVES

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

Remove the building encroachments and/or redesign or relocate the detached Water Tank constructed upon the subject property to fit within the correct building envelope denoted on the recent survey map as prescribed by the Zoning Code. Any structural or design correction would be expensive and cost prohibitive.

Consolidate the subject property with adjoining property and resubdivide the property to modify property lines and adjust minimum yard setbacks. Given the location of the encroachments (side yard), consolidation/resubdivision with the adjoining property would not be practical.

#### 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.

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. This can be substantiated, to some degree, by the fact that this office did not receive any complaint from surrounding property owners during the 16 years of existence of the structure. Also, no comments or objections were received from the surrounding property owners or general public in response to the Notification of Surrounding Properties Owners.

#### 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 Hawai'i harmless from and against any loss, liability, claim, or demand for the property damage, personal injury, or death arising out of any act or omission of the applicants/owners, their successors or assigns, officers, employees, contractors, or agents under this variance or relating to or connected with the granting of this variance.
3. No permit shall be granted to allow an ohana or second single-family or farm dwelling upon the subject TMK property, subject to provisions of the Zoning Code or State Law, which may change from time to time.
4. The as-built water tank built upon the subject property ("LOT 1") will not meet the minimum side yard requirements pursuant to Chapter 25, the Zoning Code, according to the variance application's site plan map.
5. Should the as-built water tank (footprint) upon the subject property be destroyed by fire or other natural causes, the replacement or the new water tank shall comply with the County Zoning Code and be subject to State law and County ordinances and regulations pertaining to building construction 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.

Niels Christensen

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Should any of the foregoing variance conditions not be complied with, the Planning Director may proceed to declare subject Variance- 10-005 null and void.

Sincerely,

A handwritten signature in cursive script, appearing to read "BJ Leithhead Todd".

BJ LEITHEAD TODD

Planning Director

LHN:kwr

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xc: Real Property Tax Office (Hilo)