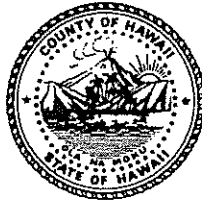


William P. Kenoi  
Mayor



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

February 3, 2011

Mr. Brian T. Nishimura  
Brian T. Nishimura, Planning Consultant  
101 Aupuni Street, Suite 217  
Hilo, HI 96720-4221

Dear Mr. Nishimura:

#### **VARIANCE-VAR 10-050**

**Applicant:** BRIAN T. NISHIMURA  
PLANNING CONSULTANT  
**Owner:** ESTATE OF CHESTER F. CHOW  
**Request:** Variance from Chapter 25, Zoning,  
Minimum Yards  
**Tax Map Key:** 2-5-033:053, Lot 36

After reviewing your variance application and information submitted, the Planning Director certifies the approval of Variance-VAR 10-050 subject to variance conditions. The variance allows "DWELLING BUILT 1994" and attendant "EAVES" to remain upon Lot 36 and portions of the dwelling having minimum building setbacks or minimum side yards ranging between minimum 8.5 feet to minimum 10.00 feet side yard pursuant to survey map dated September 7, 2010. The variance is from TMK property's minimum 10 feet side yard(s) required by Hawaii County Code, Chapter 25, Zoning, Article 5, Division 1, Section 25-5-7, Minimum yards, (a)(2)(B).

#### **BACKGROUND AND FINDINGS**

1. **Location:** The subject TMK property containing approximately 10,710 square feet, being Lot 36, Kaumana Terrace, File Plan 778, is situated at Ponahawai, South Hilo, Hawaii. The property's street address is 138 Terrace Drive.

The property is zoned Single-Family Residential (RS-10) by the County and designated Urban or "U" by the Land Use Commission (LUC). The property is not designated or within the Special Management Area (SMA).

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2. **Application-Site Plan Map:** The applicant submitted the variance application, attachments, and filing fee on December 7, 2010. The variance application's site plan map is drawn to scale and prepared by Paul H. Murray & Associates, LLC. The variance site plan map, dated September 7, 2010, denotes portions of the "DWELLING BUILT 1994" were built into and upon the minimum 10 feet (south east) side yard of "LOT 36" or subject TMK property.

The applicant's background states in part:

"The owner-builder made an apparent error in siting the dwelling during construction and was unaware that the dwelling encroached into the side yard setback area which is established as 10 feet from the side property line. Building Permit No. 932460 was issued in 1993 and the owner believed that the dwelling was closed in 1994 upon completion of the dwelling and receiving final inspection approval. No mention of any encroachment was made during the construction and inspection of the dwelling."

**Note:** The variance site plan map does not identify the location of the cesspool or Independent Wastewater System (IWS). The variance request does not address the location or position of walls, fence, and rock walls along or straddling common boundary lines shared with abutting property or right(s)-of-way fronting subject property.

3. **County Building Records:**

Hawaii County Real Property Tax Office building records show 1-Building Permit (932460), 1-Electrical Permit (E940514), and 1-Mechanical (M940271) or Plumbing Permit were issued to subject TMK property. The dwelling was completed on September 9, 1994.

4. **Agency Comments and/or Requirements:**

- a. The State of Hawaii-Department of Health (SOH-DOH) memorandum dated December 23, 2010 states:

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

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- b. The Department of Public Works (DPW) memorandum dated January 20, 2011 states in part the following:

“At the time of completion, the subject complied to all building regulations that were in effect.”

5. **Notice of Variance/Public Notice:** The applicant submitted copy of notice sent to a list surrounding property owners and proof of mailing notices to the Planning Department. According to the applicant’s affidavit, the first and second notices were sent or mailed by US Mail to surrounding property owners on or about December 27, 2010. Notice of regarding the variance application was published in the Hawaii Tribune Herald and West Hawaii Today on December 28, 2010.
6. **Comments from Surrounding Property Owners or Public:** No additional agency comments were received. No written comments or objections from surrounding property owners or general public were received.

### **SPECIAL AND UNUSUAL CIRCUMSTANCES**

The applicant, on behalf of the owner, submitted the variance application to address or resolve the dwelling encroachments built into a minimum 10 feet side yard. The variance application’s site plan map denotes the position of the dwelling upon “LOT 36” completed circa 1994. The current owner or owner’s estate became aware of dwelling encroachment issue after the survey was completed for escrow purposes. No evidence has been found to show indifference or premeditation by the owner or builders to deliberately create or intentionally allow a portion of the dwelling to be built into a minimum side yard of Lot 36 required by the Zoning Code.

It appears that the 16 + year old dwelling improvements were built and completed according to a building permit and other associated construction permits issued to subject TMK property. Further, it appears the 16 + year old dwelling encroachment into and upon the affected side yard of Lot 36 went unnoticed by the agencies during construction of the dwelling.

### **ALTERNATIVES**

Alternatives available to the applicant or owner to address and correct the building encroachment into the side yard include the following actions:

1. Remove the building encroachments or redesigning or relocating the dwelling to fit within the correct building envelope prescribed by the Zoning Code.

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2. Consolidation of Lot 36 with adjoining lot (TMK: 2-5-033:052, Lot 35) and resubdivision to modify property lines or adjust minimum yards, etc.

### **INTENT AND PURPOSE**

The intent and purpose of requiring building setbacks for a subdivision or development 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 subject building encroachments constructed approximately 16 + years ago within the minimum side yard are not physically and/or visually obtrusive from the adjacent property (Lot 35) or public rights-of-way. No objections were received from owners of abutting lots or surrounding neighborhood. Therefore, it is felt that these 16 + year old building encroachments into the affected side yard identified on the variance application's site plan map do not depreciate or detract from the character of the surrounding neighborhood and surrounding land patterns or subdivision.

Based on the foregoing findings, the approval of the applicant's variance application 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, it is felt that the variance will not be materially detrimental to the public's welfare and will not cause substantial adverse impact to the area's character and adjoining properties.

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

This applicant's variance application is **approved** and 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.
3. Portions of the dwelling built upon "LOT 36" will not meet the minimum side yard requirements pursuant to Chapter 25; the Zoning Code, according to the variance application's site plan map. The variance application permits the

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“DWELLING BUILT 1994” to remain upon subject TMK property or “LOT 36” pursuant according to the variance site plan map dated September 7, 2010.

4. Pursuant to Chapter 25, Zoning Section 25-6-32, an ohana dwelling permit is prohibited from being issued or constructed upon Lot 36.
5. Future or new building improvements or additions 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 conditions not be complied with, the Planning Director may proceed to declare Variance-VAR 10-050 null and void.

Sincerely,



BJ LEITHEAD TODD  
Planning Director

WRY/GS: nci

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xc: Real Property Tax Office-Hilo