

William P. Keno  
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

September 20, 2011

Mr. Niels Christensen, L.P.L.S.  
The Independent Hawaii Surveyors, LLC  
P. O. Box 577  
Hilo, HI 96721

Dear Mr. Christensen:

**SUBJECT: VARIANCE: VAR-11-030**

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

**Owners: ROBERT WYTOSKY**

**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: 1-3-027:043 (Lot 15)**

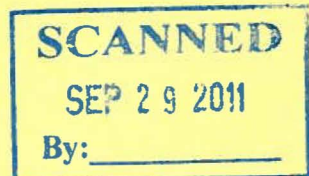
After reviewing your variance application, the Planning Director certifies the **approval** of VAR 11-030, subject to conditions. The variance will allow portions of the single family-dwelling to remain on Lot 15, with a minimum 22.65 feet rear yard and a minimum 11.05 feet rear yard and rear yard open space in lieu of the minimum 30.0 feet rear yard and minimum 24.0 feet rear yard open space requirement. The variance is from the subject property's minimum rear yard and rear yard open space requirements 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).

### **BACKGROUND AND FINDINGS**

1. **Location.** The subject property consists of approximately 1.35 acre in land area and is situated within the Leilani Estates Subdivision, Keahialaka, Puna, Hawai'i. The subject property's street address is 13-901 Malama Street. The subject property is zoned Agricultural – 1 Acre (A-1a) by the County and designated Agricultural or "A" by the State Land Use Commission (LUC).

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SEP 29 2011



2. **Variance Application.** The applicant/owner submitted the variance application, attachments, filing fee, and associated materials on July 11, 2011. The variance application's site plan map is drawn to scale, and prepared by Niels Christensen, LPLS, and denotes the position of the single family dwelling constructed into minimum 30-foot wide rear yard setback and 24-foot rear yard open space requirement.
3. **County Building Records.** Hawai'i County Real Property Tax Office records indicate that a building permit (#850553) was issued to the subject property for a single-story, single-family dwelling consisting of 1 bedroom, 1 bath, living room, kitchen and dining area, carport and detached water tank.
4. **Agency Comments and Requirements.**
  - a. The State Department of Health (DOH) memorandum dated August 9, 2011 states:

"The Health Department found no environmental health concerns with regulatory implications in the submittals."
  - b. No comments were received from the Department of Public Works – Building Division as of this date.
5. **Public Notice.** The applicant filed a transmittal letter with copy of the notices sent to surrounding property owners via USPS. According to USPS certificate of mailing receipts and affixed postal receipts, the first and second notices were mailed on July 11, 2011 and August 19, 2011, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on August 12, 2011.
6. **Comments from Surrounding Property Owners or Public.** No written comments or objections from surrounding property owners or the general public were received.

#### SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant/owner submitted the variance application to address and/or resolve the encroachments within the property's minimum 30 foot rear yard and 24 foot rear yard open space requirement. The variance application's site plan denotes the location of the single family dwelling upon "Lot 15". The current owners were unaware of any encroachment of the single-family residence and roof eave constructed by a previous owner, and would not have discovered any problems affecting the property until a modern survey was conducted by Niels Christensen, LPLS, revealing the setback violations. No evidence has been found to show indifference or premeditation by the builder to intentionally construct a portion of the single family dwelling

and attendant roof eave into the property's minimum 30 feet rear yard setback and attendant minimum 24 feet rear 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 rear yard of the subject property include the following actions:

Remove the building encroachment constructed upon the subject property to fit within the correct building envelope denoted on the recent plot map as prescribed by the Zoning Code. *Any structural or design correction would be expensive and cost prohibitive.*

Consolidate the subject property with adjoining properties and resubdivide the property to modify property lines and adjust minimum yard setbacks. *Given the location of the encroachments (rear 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 or development 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 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 roughly 26 years since the single family dwelling was constructed. As such, it is felt that the issuance of this variance will not depreciate or detract from the character of the immediately surrounding 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

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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 property, subject to provisions of the Zoning Code or State Law which may change from time to time.
4. Portion of the single family dwelling built upon the subject property ("LOT 15") will not meet the minimum rear yard and open space requirements pursuant to Chapter 25, the Zoning Code, according to the variance application's site plan map.
5. Should the single-family dwelling (footprint) upon the subject property be destroyed by fire or other natural causes, the replacement structure(s) 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.

Should any of the foregoing variance conditions not be complied with, the Planning Director may proceed to declare subject Variance 11-030 null and void.

Sincerely,



BJ LEITHEAD TODD  
Planning Director

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xc: Real Property Tax Office (Hilo)  
TMK File