

Harry Kim  
Mayor



Michael Yee  
Director

Daryn Arai  
Deputy Director

West Hawai'i Office  
74-5044 Ane Keohokalole Hwy  
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**County of Hawai'i**  
**PLANNING DEPARTMENT**

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

January 2, 2018

Ms. Lori Mikkelson  
P. O. Box 291  
Laupāhoehoe, HI 96764

Dear Ms. Mikkelson:

**SUBJECT: Application: VARIANCE – VAR-15-000283**  
**Applicant: ALL AINA SERVICES/LORI MIKKELSON**  
**Owners: SHAHNAZ MONTAGUE, M.D.**  
**Request: Variance from Chapter 25, Zoning, Article 5,**  
**Division 1, Section 25-5-7, Minimum Yards, Section 25-4-44,**  
**Permitted Projections into Yards and Open Space**  
**Requirements (Encroachment into Side Southwest Yard**  
**Setback)**  
**TMK: 2-2-020:004, Lot 31**

After reviewing your variance application, the Planning Director certifies the **denial** of VAR-15-000283. The variance application seeks to allow an “as built” open deck to remain within the southwest side yard with a minimum 3-foot side (southwest) yard open in lieu of the required 4-foot open space. The variance is from Hawai'i County Code, Chapter 25, Zoning, Article 5, Division 1, Section 25-5-7, Minimum yards and Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open space requirements.

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, consists of approximately 9,827 square feet of land, is situated at Waiākea House Lots, Waiākea, South Hilo, Hawai'i. The subject property's street address is 1086 A Kino'ole Street.
2. **Zoning.** Single-Family Residential – 10,000 sq. ft. (RS-10).
3. **State Land Use.** Urban (U).

4. **Required Setback.** Flag lot – 8-foot side yards. The minimum yards for a flag lot, excluding the access drive, shall be the minimum side yards required for a building site in the applicable zoning district.
5. **Variance Application-Site Plan.** The applicant submitted the variance application, attachments, and filing fee on April 28, 2015, and other submittals related to the variance request and variance application. The variance application's survey site plan map is drawn to scale and prepared by Roy G. Hollowell, LPLS shows the as-built open deck encroaches 2 feet into the adjacent property (TMK: 2-2-028:007).
6. **County Building Records.** No Building Permit records for structures.
7. **Agency Comments and Requirements.**
  - a. The State Department of Health (DOH) memorandum, dated May 27, 2015. **(Exhibit A)**
  - b. The Department of Public Works (DPW) – Building Division email dated May 19, 2015. **(Exhibit B)**
  - c. The State of Hawai'i –Hawai'i Public Housing Authority letter dated May 21, 2015.
8. **Notice to Surrounding Property Owners.** A copy of the first and second notices was 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 notice was mailed on April 28, 2015. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on April 14, 2015.
9. **Comments from Surrounding Property Owners or Public.**
  - a. Objection letter dated May 21, 2015 by Mr. Haki Ouansafi, Executive Director, State of Hawai'i – Hawai'i Public Housing Authority.

#### **ANALYSIS OF GROUNDS FOR VARIANCE**

No variance will be granted unless it is found that:

- (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 the property.*

The variance application does not meet with criteria (a) for the following reasons:

There are no special or unusual circumstances applying to the 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.

The owner/applicant submitted the variance application to address or resolve the encroachment of the as-built deck open into the 4-foot southwest side yard open space as required by the Zoning Code.

The variance application's survey site plan map is drawn to scale and prepared by Roy G. Hollowell, LPLS shows the as built open deck encroaches 2 feet into the adjacent property TMK: 2-2-028:007. The owner proposes to remove 2 feet of the open deck encroaching in the adjacent property and seeks approval of a 3-foot side yard open space.

The applicant has stated, "*The current owner purchased the subject property 05/09/2012. At that time of purchase, there was an outside laundry area located at the back of the house under an old lanai that had fallen into disrepair. The new owner replaced the old lanai with a new one, the exact size and in the exact location of the original. Unbeknownst and undisclosed to the new owner the original lanai that sheltered the existing laundry area was built without building permits, also known as an "as built" structure.*"

However, according to the photographs of the old **(Exhibit C)** and new **(Exhibit D)** structures, we find that the applicant's claim that the old structure was replaced a by new one similar in size and location is incorrect. The previous structure was basically a 'lean-to' that provided shelter for the washer and dryer; the new structure is a more substantial open deck with railings.

The Department of Public Works – Building Division and Hawai'i County Real Property Tax Department records indicate that there are no building permits issued for the open deck. The single-family dwelling built in 1939 is considered a legal non-conforming structure, built prior to the adoption of the Zoning Code in 1967.

In review of the application materials, county records, and associated documentation, the Planning Department finds that there are no special or unusual circumstances justifying the approval of this variance. Also, there is ample room on the subject property to relocate the washer and dryer and provide shelter from the weather elements and still comply with the setback requirements.

**(b) *There are no other reasonable alternatives that would resolve the difficulty.***

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

Since the Variance application is denied, there are no reasonable alternatives except for the removal of the open deck constructed upon the subject property.

- (c) *The variance is consistent with the general purpose of the district, the intent and purpose of this chapter, and the general plan, and will not be materially detrimental to the public's welfare or cause substantial, adverse impact to an area's character or to adjoining properties.*

The variance application does not meet with criteria (c) for the following reasons:

The intent and purpose of requiring building setbacks on a lot are to assure that adequate air circulation and exposure to light are available between permitted structure(s)/uses and boundary/property lines.

The previous structure was basically a 'lean-to' that provided shelter for the washer and dryer, the new structure is a more substantial open deck with railings. See attached photographs for visual reference. This is contrary to what the applicant has stated. Therefore, after reviewing the variance application, county records and other documentation, the Planning Director finds that the "as built" open deck constructed into the southwest side yard open space exceeded what could reasonable be considered a repair. Based on the background information and other materials referenced in the variance analysis, the variance to allow for the encroachment would not be consistent with the general purpose of the zoning district and the intents and purpose of the Zoning code, Subdivision code and the County General plan.

#### **VARIANCE DECISION-CONDITIONS**

The variance application, VAR 15-000283, concerning the applicant's request to allow the "as built" open deck into the side (southwest) yard setback and open space setback is hereby **denied** and the following conditions are imposed.

#### **Conditions:**

1. The applicant shall remove that portion of the "as built" open deck within four (4) feet from the property line to comply with the 4-foot open space requirement, set forth, within the Hawai'i County Code, Chapter 25, Zoning, Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open space requirements, within three (3) months of the date of this decision or by March 31, 2018.
2. The applicant shall obtain all necessary permits for the unpermitted open deck, as modified by Condition No. 1, and 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 the 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, 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.

Lori Mikkelson  
All Aina Services  
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January 2, 2018

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

Sincerely,



MICHAEL YEE  
Planning Director

LHN:nci

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Encl: Exhibits A & B - Agency comments  
Exhibits C & D - Pictures of old and current structure  
General Petition for Appeal of Decisions by Planning Director form

cc: Gilbert Bailado, Planning GIS

Mr. Haki Ouansafi, Executive Director  
State of Hawai'i – Hawai'i Public Housing Authority  
1002 North School Street  
Honolulu, HI 96717



HEALTH DEPARTMENT  
STATE OF HAWAII

15 MAY 28 PM 3:30

**STATE OF HAWAII**  
**DEPARTMENT OF HEALTH**  
P.O. BOX 916  
HILO, HAWAII 96721-0916

MEMORANDUM

DATE: May 27, 2015

TO: Mr. Duane Kanuha  
Planning Director, County of Hawaii

FROM: Newton Inouye *NI*  
District Environmental Health Program Chief

SUBJECT: Application: Variance – VAR 15-000283  
Applicant: ALL AINA SERVICES/LORI MIKKELSON  
Owner: SHAHNAZ MONTAGUE, M.D.  
Request: Variance from Chapter 25, Zoning, Article 5, Division 1,  
Section 25-5-7, Minimum Yards; Article 4, Division 4,  
Section 25-4-44(a), Permitted Projections into Yards and  
Open Space Requirements (Encroachment into Rear  
(Southwest) Yard Setback)  
Tax Map Key:2-2-020:004, Lot 31; Puna, Hawaii

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

**EXHIBIT**

A



VAR 15-000283

PLANNING DEPARTMENT  
COUNTY OF HAWAII

2015 MAY 19 PM 2:54

Matsumoto, Joy

Tue 5/19/2015 2:03 PM

To: Nakayama, Larry &lt;Larry.Nakayama@hawaiicounty.gov&gt;;

Cc: Nakashima, Kathy &lt;Kathy.Nakashima@hawaiicounty.gov&gt;;

Variance – VAR 15-000283

Owner: Shahnaz Montague, MD

TMK: 2-2-020:004

Per the 2006 International Residential Code, Section R302 Exterior walls and Table R302.1, an unroofed open deck may not be closer than 2 feet to the property line. Therefore, the requested setback of 3 feet to the farthest projection of the deck would be acceptable.

However, if the unpermitted lanai is replaced with a covered area for the laundry and has a roof, columns and header – it is considered a wall and will have requirements. A wall with openings is not allowed within 3 feet of the property line. From 3 to 5 feet from the property line the wall can be 25% open and must have a 1 hour fire rating. Light and ventilation may be an issue depending on the floor plan of the first floor.

*Joy Matsumoto*

Supervising Building Inspector

County of Hawaii

Tel. (808) 961-8471

Fax (808) 961-8410

Email: [jmatsumoto@co.hawaii.hi.us](mailto:jmatsumoto@co.hawaii.hi.us)**EXHIBIT**B



A

EXHIBIT

C

Lanai After Photo

**EXHIBIT**

*D*

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