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**County of Hawai'i**  
**PLANNING DEPARTMENT**

East Hawai'i Office  
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July 18, 2016

Charlene Byrd  
16-566 Keaau-Pahoa Road  
#188-124  
Kea'au, Hawai'i 96749

Dear Ms. Byrd:

**SUBJECT: Application: Variance - VAR 16-000371-Revised**  
**Applicant: CHARLENE BYRD**  
**Owner: CHARLENE BYRD**  
**Request: Variance from Chapter 25, Zoning, Article 5, Division 7,**  
**Section 25-5-76, Minimum Yards, and Section 25-4-44,**  
**Permitted Projections into Yards and Open Space**  
**Requirements (Encroachment into northeast Side Yard**  
**Setback)**

**Tax Map Key: 1-1-031:029; Lot 58**

The Planning Director certifies the **approval** of Variance 16-000371-Revised, subject to conditions. This revised variance (Variance-16-000371-Revised) is to correct the incorrect labeling of the structure encroaching into the side yard setback from detached garage to detached bedroom as referenced in the e-mail dated July 18, 2016 (See Exhibit B). **This letter replaces the original letter dated July 8, 2016, approving the variance.**

The variance will allow a section of the detached bedroom to remain on Lot 58, with a minimum 17.7-foot side (northeast) yard setback in lieu of the required 20-foot side yard setback. It will also allow for the 4-foot high water tank with a minimum 12-foot side (northeast) yard open space in lieu of the required 14-foot side yard open space requirement. The variance is from the subject property's minimum 20-foot side yard setback and 14-foot side yard open space requirement. These exceptions are in lieu of the required 20-foot side yard setback and 14-foot side yard open space, as required by the Hawai'i County Code, Chapter 25, Zoning, Section 25-5-7, Minimum yards and Section 25-4-44 (a), Permitted projections into yards and open space requirements.

The variance request also referenced an encroachment of the gravel driveway into the neighbor's (Lot 57) property. The gravel driveway is excluded from this variance approval as separate action is required by the property owners affected by the encroachment. The owner/applicant has stated in its background report that the encroachment of the gravel driveway has been removed

### **BACKGROUND AND FINDINGS**

1. **Location.** The subject property contains approximately 3 acres and is located in the Fern Forest Vacation Estates Subdivision, situated at Kea'au, Puna, Hawai'i. The subject property's street address is 11-2024 Ohialani Road.
2. **County Zoning.** Agricultural – 3 acre (A-3a).
3. **State Land Use Designation.** Agricultural.
4. **Required Setback.** 30-foot front and rear; 20-feet for sides.
5. **Variance Application.** The applicant/owner submitted the variance application, attachments, filing fee, and associated materials on May 27, 2016. The variance site plan is drawn to scale, prepared by the Daniel L. Berg, L.P.L.S. (dlb & Associates, LLC), and denotes the position of the detached bedroom constructed into the minimum 20-foot side (northeast) yard setback and 4-foot high water tank, constructed into the minimum 14-foot side (northeast) yard open space requirement. The request affects the northeast yard setback and side yard open space.  
**(See attached survey map – Exhibit A)**

The survey map shows that portion of the detached bedroom encroaches 2.3 feet into the 20-foot side (northeast) yard setback and the 4-foot high water tank encroaches 2 feet into the 14-foot side (northeast) yard open space.

The encroachment leaves the detached bedroom with a minimum 17.7-foot side (northeast) yard setback, in lieu of the required 20-foot side (northeast) yard setback. It also leaves the 4-foot high water tank with a minimum 12-foot side (northeast) yard open space in lieu of the required 14-foot side (northeast) yard open space.

6. **County Building Records.** Hawai'i County Real Property Tax Office Records indicate that a building permit (B2010-1355H) was issued on September 15, 2010, to the subject property for a single-family dwelling consisting of 4 bedrooms, 3 baths, living room, kitchen and dining area. Subsequently, an additional building permit (2011-0287H) was issued on April 12, 2011, for a new detached garage with 2 overhead doors.
7. **Agency Comments and Requirements.**
  - a. State Department of Health (DOH) memorandum dated June 17, 2016. "The Health Department found no environmental health concerns with regulatory implications in the submittals."

- b. No comments received from the Department of Public Works Building Division.
8. **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 May 31, 2016 and June 13, 2016, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on June 15, 2016.
9. **Comments from Surrounding Property Owners or Public.** No written comments or objections from surrounding property owners or the general public were received.

### 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 meets criteria (a) for the following reasons:**

The owner/applicant submitted the variance application to address or resolve the encroachment of the detached bedroom into the 20-foot northeast side yard setback and the 4-foot water tank into the 14-foot into the side yard open space requirement.

The survey map shows that portion of the detached bedroom encroaches 2.3 feet into the 20-foot side (northeast) yard setback and the 4-foot high water tank encroaches 2 feet into the 14-foot side (northeast) yard open space.

The encroachment leaves the detached bedroom with a minimum 17.7-foot side (northeast) yard setback, in lieu of the required 20-foot side (northeast) yard setback. It also leaves the 4-foot high water tank with a minimum 12-foot side (northeast) yard open space in lieu of the required 14-foot side (northeast) yard open space.

No evidence has been found to show indifference or premeditation by the past owners or builders to deliberately create or intentionally allow the building encroachment problems to occur. It appears that the original dwelling improvements with detached bedroom and detached water tank were constructed in 2010, nearly 6 years ago under valid building permits and other construction permits issued by the County. It also appears that past building permits inspections of the premises by the agencies during construction of the dwelling improvements did not disclose any building encroachment issues or building setback irregularities at that time.

Based on the above-mentioned information, special and unusual circumstances do exist to an extent that they deprive the owner of substantial property rights that would otherwise be available,

or which unreasonably interfere with the best use or manner of development of the subject property.

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

**The variance application meets criteria (b) for the following reasons:**

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

Remove the building encroachments and/or redesign the detached bedroom denoted on the survey map to fit within the correct building envelope as prescribed by the Zoning Code. This alternative would be deemed unreasonable, especially when the owners complied with the building permit process and were under the impression that the detached bedroom and water tank was in compliance with all County requirements. Requiring the owner to relocate the water tank would involve the owner to do major excavation to her property by having to replace and move existing water lines. Any structural or design correction of the detached bedroom to meet setback requirement would leave unattractive reconstruction scars.

Another alternative is to consolidate the subject property with the adjoining side property which is owned by someone else, and resubdivide the property to modify property lines and adjust minimum yard setbacks. Therefore, to consolidate and re-subdivide the property to modify property lines and adjust minimum side yard setbacks are not viable options; there are no reasonable alternatives to resolve the encroachment issue.

***(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 welfare or cause substantial, adverse impact to an area's character or to adjoining properties.***

**The variance application meets criteria (c) for the following reasons:**

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

No evidence has been found to show indifference or premeditation by the owners or builders to deliberately create or intentionally allow the building encroachment problems to occur.

The detached bedroom and detached water tank were constructed in 2010, nearly 6 years ago were constructed under valid building permits and other construction permits issued by the County. It also appears that past building permits inspections of the premises by the agencies during construction of the dwelling improvements did not disclose any building encroachment issues or building setback irregularities at that time.

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. The detached bedroom and detached water tank were constructed in 2010, nearly 6 years ago under valid building permits and other construction permits issued by the County. As such, it is felt that the issuance of this variance will not depreciate or detract from the character of the surrounding properties.

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.

Therefore, the variance would be consistent with the general purpose of the zoning district and not be materially detrimental to the public's welfare or cause substantial adverse impact to the area's character or to adjoining properties.

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

Based on the variance application's survey map, the detached bedroom and 4-foot high water tank built upon the subject property ("LOT 58") will not meet the minimum side yard requirements pursuant to Hawai'i County Code, Chapter 25, (Zoning Code).

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. Should the detached bedroom and 4-foot high water tank built on the subject property be destroyed by fire or other natural causes, the replacement structure shall comply with the Hawai'i County Code, Chapter 25, (Zoning) and be subject to State law and County ordinances and regulations pertaining to building construction occupancy.
4. An Ohana or Farm Dwelling permit shall not be approved for the subject property, subject to the provisions of the Hawai'i County Code, Chapter 25, (Zoning) or state law, which may change from time to time.
5. 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-16-000371-Revised null and void.

Sincerely,



DUANE KANUHA  
Planning Director

LHN/SKG:lnm

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xc: Real Property Tax Office (Hilo)  
Gilbert Bailado, GIS (via email)

**Nakayama, Larry**

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**From:** alice wise <awise22@yahoo.com>  
**Sent:** Monday, July 18, 2016 11:41 AM  
**To:** Nakayama, Larry  
**Cc:** cynthiamarvin@aol.com; Laura Richman; Deitra Lopez; Katie Jones  
**Subject:** Variance

Hi Mr. Nakayama,

Per our conversation and with the request of my client,  
I am writing on behalf of Ms. Charlene Byrd, regarding her Variance Approval.

There seems to be a discrepancy regarding the description of corner of the house.

According to the description, page 2, number 5. paragraph 2; it states;

"Survey map shows that a portion of the detached garage encroaches 2.3 feet into the foot (northeast) yard setback."

However, this area is actually the corner of the 4th bedroom, not detached garage.  
There is a detached garage towards the back of property but it is not encroaching on the setbacks.

Could you Please update this as soon as possible?

Seller is unable to proceed with the sale of her property until report is corrected.

Thank you very much for your time.

Please confirm you've received this .

Aloha,

Alice Wise, Realtor, SFR  
Century 21 Homefinders of Hawaii  
200 Kanoelehua Avenue Suite 100B  
Hilo, HI. 96720  
(800) 735-2101 ext 205  
(808) 935-5830 (fax)  
(808) 937-5517 (cell)

**EXHIBIT**

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**Nakayama, Larry**

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**From:** cynthiamarvin@aol.com  
**Sent:** Monday, July 18, 2016 9:42 AM  
**To:** Nakayama, Larry  
**Subject:** Variance

Hi Larry,

When I built the house the house plan was for a four bedroom, three bath home. The fourth bedroom is where they are calling it a detached garage. There was never a detached garage there. It was all permitted and built at the same time.

Could you let me know when I could pick up the revised or amended Variance.

Thank you,

Charlene Byrd

Best Wishes! 2016



