

Harry Kim  
Mayor



Michael Yee  
Director

Daryn Arai  
Deputy Director

West Hawai'i Office  
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Phone (808) 323-4770  
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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

December 23, 2016

Lori Mikkelson  
All Aina Services  
P. O. Box 291  
Laupahoehoe, Hawaii 96764

Dear Ms. Mikkelson:

**SUBJECT: Application: Variance - VAR 16-000382**  
**Applicant: ALL AINA SERVICES/LORI MIKKELSON**  
**Owner: ROBERT A. BROWN & ALAN G. DEL NERO**  
**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 Northwest Side Yard Setback)**

**Tax Map Key: 1-6-010:179; Lot 28**

The Planning Director certifies the **approval** of Variance 16-000382, subject to conditions. The variance will allow portion of a garage to remain with a minimum 9.6-foot side (northwest) yard setback, in lieu of the required 20-foot side yard setback. The garage roof eave projection results in an 8.4-foot side (northwest) yard open space in lieu of the required 14-foot open space requirement. The variance will also allow for a water tank to remain with a minimum 8-foot side (northwest) yard setback and side (northwest) yard open space in lieu of the required 20-foot side yard setback and 14-foot side yard open space, respectively. 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 25-5-76, Minimum yards and Section 25-4-44 (a), Permitted projections into yards and open space requirements.

**BACKGROUND AND FINDINGS**

1. **Location.** The subject property contains approximately 2.002 acres and is located in the Orchid Land Estates, situated at Kea'au, Puna, Hawai'i. The subject property's street address is 16-1553 35<sup>th</sup> Avenue.

2. **County Zoning.** Agricultural – 3 acre (A-3a).
3. **State Land Use Designation.** Agricultural.
4. **Required Setback.** 30 feet for front and rear; 20 feet for sides.
5. **Variance Application.** The applicant/owner submitted the variance application, attachments, filing fee, and associated materials on July 20, 2016. The variance site plan is drawn to scale, prepared by the Roy G. Holloway, L.P.L.S., and denotes the position of the garage constructed into the minimum 20-foot side (northwest) yard setback. The request affects the northwest side yard setback and side yard open space requirements. **(See attached survey map – Exhibit A)**

The survey map shows that portion of the garage encroaches 10.4 feet into the 20-foot side (northwest) yard setback and the associated roof eave encroaches 5.6 feet into the 14-foot side (northwest) yard open space. It also shows the detached water tank encroaches 12 feet into the 20-foot side (northwest) yard setback and 6 feet into the 14-foot side (northwest) yard setback.

The encroachment leaves the garage with a minimum 9.6-foot side (northwest) yard setback, in lieu of the required 20-foot side yard setback. The associated garage roof eave projection results with an 8.4-foot side (northwest) yard open space in lieu of the required 14-foot open space requirement. The detached water tank remains with an 8-foot side (northwest) yard setback and side yard open space in lieu of the required 20-foot side yard setback 14-foot side yard open space requirements.

6. **County Building Records.** Hawai'i County Real Property Tax Office Records indicate that a building permit (880877) was issued on May 24, 1988, to the subject property for a single-family dwelling consisting of 3 bedrooms, 2 baths, living room, kitchen and dining area. Subsequently, an additional building permit (912899) was issued on December 19, 1991 for the construction of a two-car garage.
7. **Agency Comments and Requirements.**
  - a. State Department of Health (DOH) memorandum dated September 1, 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 July 12, 2016 and August 22, 2016, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on August 16, 2016.

9. **Comments from Surrounding Property Owners or Public.** No written comments or objections from surrounding property owners or the general public were received.
10. **Time Extension.** The applicant's variance application was acknowledged by letter dated August 8, 2016 and additional time to review the application was required. The applicant granted the Planning Director an extension of time for decision on the Variance Application.

#### **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 garage and water tank built into the 20-foot northwest side yard setback.

The survey map shows that portion of the garage encroaches 10.4 feet into the 20-foot side (northwest) yard setback and the associated roof eave encroaches 5.6 feet into the 14-foot side (northwest) yard open space. It also shows the detached water tank encroaches 6 feet into the 14-foot side (northwest) yard setback and side (northwest) yard open space.

The encroachment leaves the garage with a minimum 9.6-foot side (northwest) yard setback, in lieu of the required 20-foot side yard setback and associated roof eave projection resulting with a 8.4-foot side (northwest) yard open space in lieu of the required 14-foot open space requirement.

Further, the detached water tank remains with an 8-foot side (northwest) yard setback and side (northwest) open space in lieu of the required 20-foot side yard setback and 14-foot side yard open space requirements.

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 constructed in 1989, nearly 27 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.

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 water tank encroachments constructed into the affected side yard setback of the subject property include the following actions:

Remove the building encroachments and/or redesign the single-family dwelling and water tank denoted on the survey map to fit within the correct building envelope as prescribed by the Zoning Code. Requiring the owner to relocate the single-family dwelling and water tank would involve the owner to do major excavation to his property by having to replace and move existing water lines. This alternative would be deemed unreasonable, especially when the owners complied with the building permit process and were under the impression that the water tank and storage room were in compliance with all County requirements.

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 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 garage

and water tank have been in existence for approximately 27 years and were constructed under valid building permits and other construction permits issued by the County of Hawai'i.

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 garage and water tank built on the subject property ("LOT 28") 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 garage and 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.

Lori Mikkelson  
All Aina Services  
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Should any of the foregoing variance conditions not be complied with, the Planning Director may proceed to declare subject Variance-16-000382 null and void.

Sincerely,



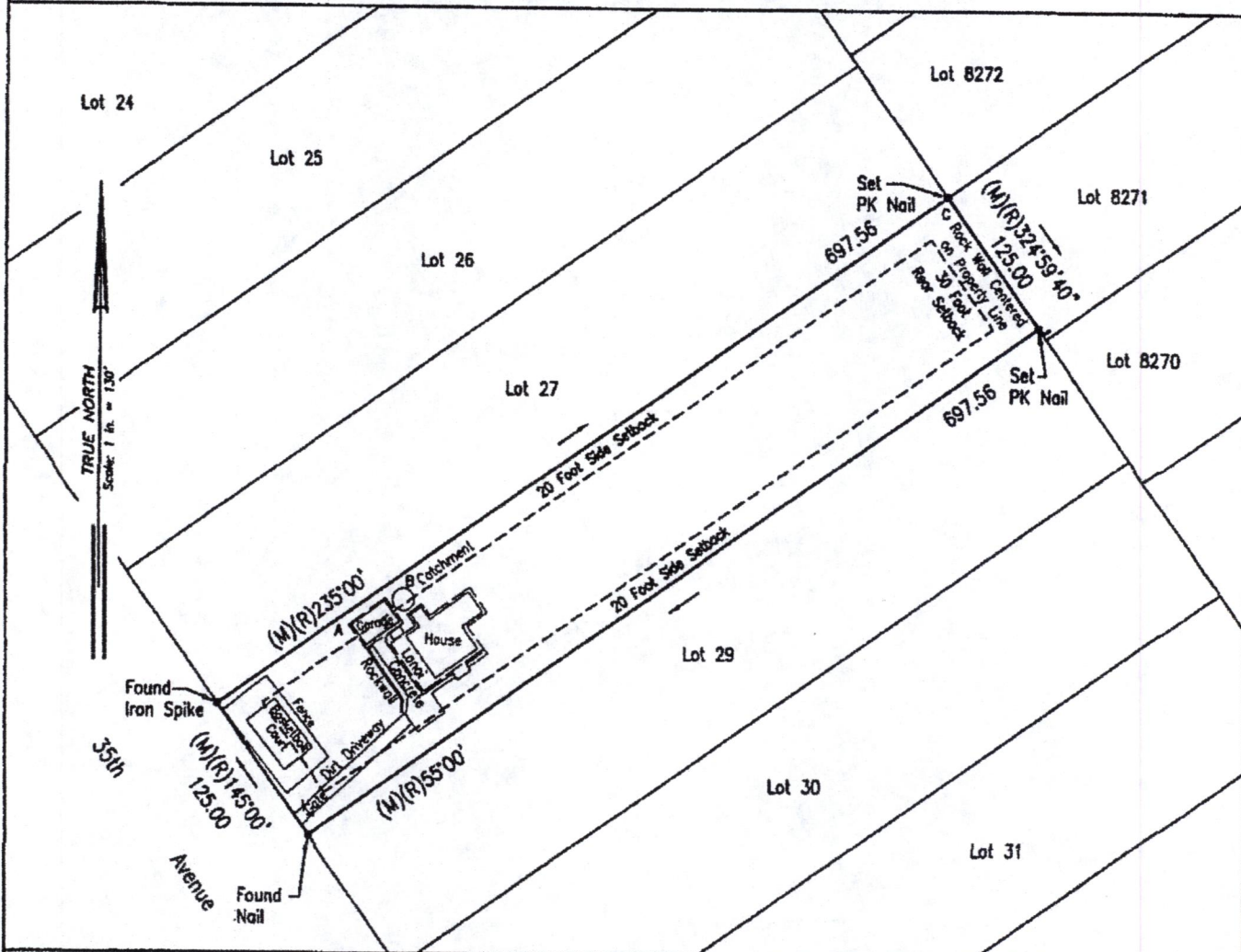
MICHAEL YEE  
Planning Director

LHN:nci

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

**K-2 SURVEY  
 LOT 28, BLOCK E-E-E  
 LAND COURT APPLICATION 1053, MAP 53  
 ORCHID LAND ESTATES  
 KEAAU, PUNA, ISLAND OF HAWAII, HAWAII  
 TMK: (3rd) 1-6-010: 179**



**Notes**

Scale: 1" = 130 feet

1. Corner markers shown as found were accepted. Corner markers shown as set were established based upon found corner markers within the subdivision. The measured dimensions (M) are within acceptable tolerances to record dimensions (R) for this type of land.

2. Building setbacks per County of Hawaii Planning Department. 30 foot front and rear and 20 foot on sides.

3. Improvement Notes:  
 A. Garage corner 9.6 from property line (PL). Garage roof eave 8.4 from PL.  
 B. Water catchment tank 8.0 from PL.  
 C. Rock wall at rear of lot centered on PL.

4. Survey performed at the request of Thomas Williams.

This survey was performed by me or under my direct supervision on May 19, 2016.

*Roy G. Hollowell*

Roy G. Hollowell  
 Licensed Professional Land Surveyor  
 Certificate Number 12741  
 Expires: April 30, 2018



**EXHIBIT**

Island Boundary  
 RR 3, Box 81571, Pahoa, HI 96778  
 (808) 345-1561

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