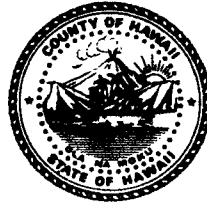


William P. Kenoi
Mayor



Duane Kanuha
Director

Joaquin Gamiao-Kunkel
Deputy Director

West Hawai'i Office
74-5044 Ane Keohokalole Hwy
Kailua-Kona, Hawai'i 96740
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

September 30, 2016

Donna Duryea
395 Kilauea Avenue
Hilo, Hawai'i 96720

Dear Ms. Duryea:

SUBJECT: Application: Variance - VAR 16-000384
Applicant: DONNA DURYEA
Owner: KAREN MORTENSEN
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 Southeast Side Yard Setback and Southeast Side Yard Open Space)
Tax Map Key: 1-5-111:090; Lot 28

The Planning Director certifies the **approval** of Variance 15-000384, subject to conditions. The variance will allow portion of the single-family dwelling to remain with a minimum 8-foot side (southeast) yard setback, in lieu of the required 10-foot side yard setback and associated roof eave projection resulting with a 3.3-foot side (southeast) yard open space in lieu of the required 5-foot open space requirement. These exceptions are in lieu of the required 10-foot side yard setback and 5-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 11,965 square feet and is located in the Hawaiian Shores Subdivision, situated at Kea'au, Puna, Hawai'i. The subject property's street address is 15-2794 Papai Street.
2. **County Zoning.** Agricultural – 1 acre (A-1a).
3. **State Land Use Designation.** Urban.
4. **Required Setback.** 20-foot fronts; 10-foot 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 single-family dwelling constructed into the minimum 10-foot side (northeast) yard setback. The request affects the northeast yard setback. **(See attached survey map – Exhibit A)**

The survey map shows that portion of the single-family dwelling encroaches 2 feet into the 10-foot side (southeast) yard setback and the associated roof eave encroaches 1.7 feet into the 5-foot side yard open space.

The encroachment leaves the single-family dwelling with a minimum 8-foot side (southeast) yard setback, in lieu of the required 10-foot side yard setback and associated roof eave projection resulting with a 3.3-foot side (southeast) yard open space in lieu of the required 5-foot open space requirement.

6. **County Building Records.** Hawai'i County Real Property Tax Office Records indicate that a building permit (010647) was issued on May 11, 2001, to the subject property for a single-family dwelling consisting of 3 bedrooms, 2 bath, living room, kitchen and dining area.

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 18, 2016 and August 14, 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 to October 1, 2016.

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 single-family dwelling into the 10-foot southeast side yard setback and side yard open space.

The survey map shows that portion of the single-family dwelling encroaches 2 feet into the 10-foot side (southeast) yard setback and the associated roof eave encroaches 1.7 feet into the 5-foot side yard open space.

The encroachment leaves the single-family dwelling with a minimum 8-foot side (southeast) yard setback, in lieu of the required 10-foot side yard setback and associated roof eave projection resulting with a 3.3-foot side (southeast) yard open space in lieu of the required 5-foot open space requirement.

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 2001, nearly 16 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 applicant stated that the original builder based his site plan dimensions on the Tax Map Key map which he thought reflected a 76-foot frontage along Papai Street. The site plan was used for the building permit and approved by the Planning Department and other county agencies. However, file State Plan 737 reflected a 75-foot frontage along Papai Street; and as a result, the builder proceeded to build the single-family dwelling on an incorrect but approved site plan.

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 rear yard setback of the subject property include the following actions:

Remove the building encroachments and/or redesign the single-family dwelling 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 single-family dwelling was in compliance with all County requirements. Any structural or design correction of the single-family dwelling 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 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 single-family dwelling has been in existence for approximately 15 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 single-family dwelling and water tank built upon 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 single-family dwelling 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-16-000384 null and void.

Sincerely,



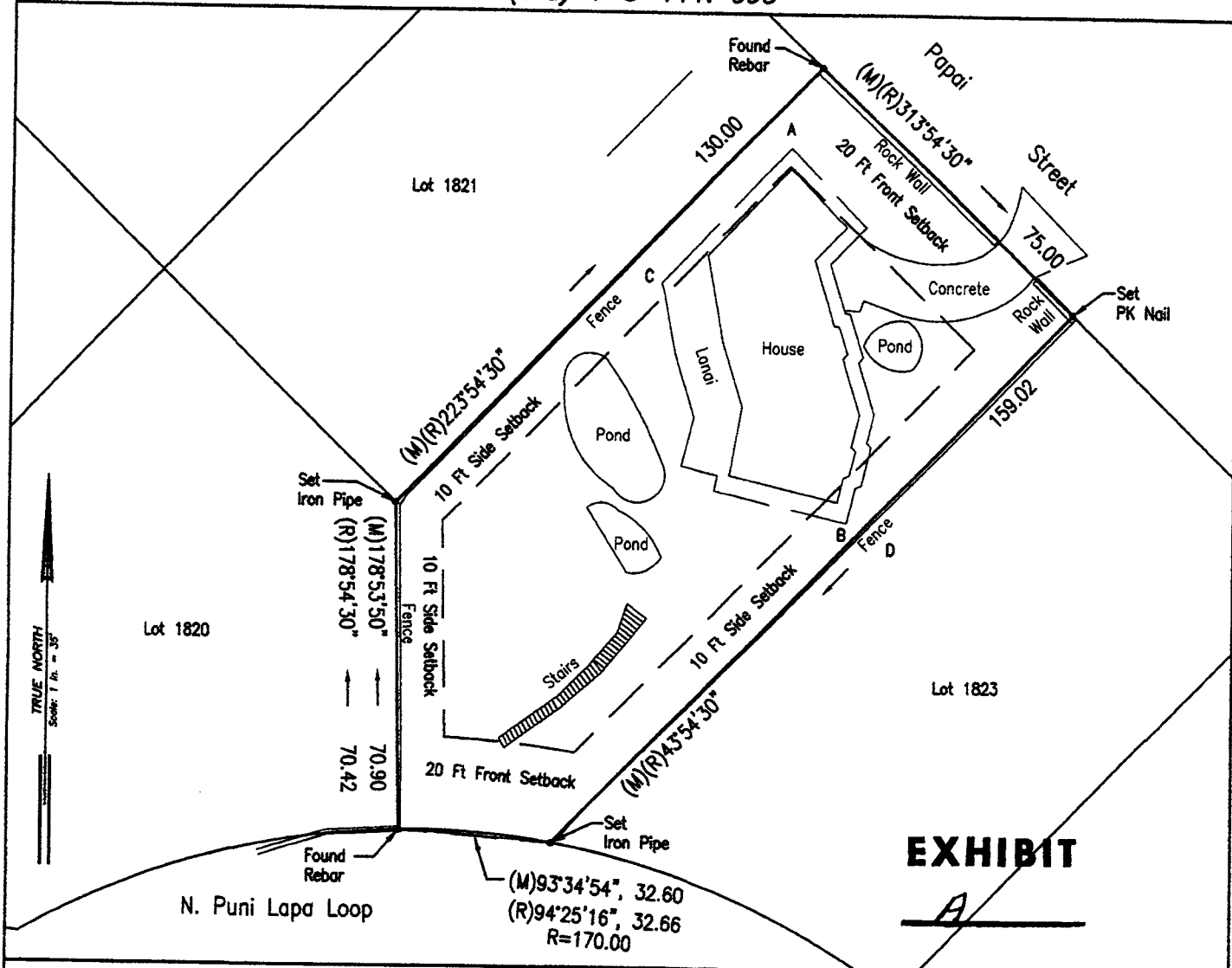
DUANE KANUHA
Planning Director

LHN:nci

P:\Admin Permits Division\Variances From CoH02\Zone1\VAR16-000384TMK1-5-111-090 Mortensen.doc

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

**K-2 SURVEY
LOT 1822
FILE PLAN No. 737
HAWAIIAN SHORES SUBDIVISION
WAIAKAHIULA, PUNA, ISLAND OF HAWAII, HAWAII
TMK: (3rd) 1-5-111: 090**



EXHIBIT

A

Notes

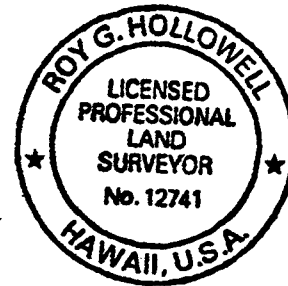
Scale: 1" = 35 feet

1. Corner markers shown as found were accepted. Corner marker shown as set was 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 setback lines per County of Hawaii County Planning Department.
3. Improvement Notes:
 - A. North house roof eave 2.6 ft into side setback and 2.9 ft into front setback.
 - B. South house corner 2.0 ft into side setback. South roof eave 6.7 ft into side setback.
 - C. Lanai roof eave 2.3 ft into side setback.
 - D. East side fence from 0.7 to 1.0 ft into Lot 1823.
4. Survey performed at the request of Donna Duryea.

This survey was performed by me or under my direct supervision on June 27, 2016.

Roy G. Hollowell

Roy G. Hollowell
Licensed Professional Land Surveyor
Certificate Number 12741
Expires: April 30, 2016



Roy G. Hollowell, LPLS
RR 3, Box 81571, Pahoa, HI 96778
(808) 345-1561