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Mayor



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County of Hawai'i
PLANNING DEPARTMENT

East Hawai'i Office
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December 16, 2016

Donna Duryea
395 Kilauea Ave
Hilo, HI 96720

Dear Ms. Duryea:

SUBJECT: Application: Variance - VAR 16-000389
Applicant: DONNA DURYEA
Owner: KIMBERLY ANN SNUGGERUD TRUST
Request: Variance from Chapter 25, Zoning, Article 5, Division 7,
Section 25-5-76, Minimum Yards (Encroachment into
Northeast Front Yard Setback)
Tax Map Key: 1-5-059:030; Lot 447

The Planning Director certifies the **approval** of Variance 15-000389, subject to conditions. The variance will allow portion of the single-family dwelling to remain with a minimum 23-foot front (northeast) yard setback to a minimum 23.6-foot front (northeast) yard setback in lieu of the required 25-foot front yard setback. These exceptions are in lieu of the required 25-foot front 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.

BACKGROUND AND FINDINGS

1. **Location.** The subject property contains approximately 21,780 square feet and is located in the Hawaiian Paradise Park Subdivision, situated at Kea'au, Puna, Hawai'i. The subject property's street address is 15-1050 Kupaoa Road.
2. **County Zoning.** Agricultural – 1 acre (A-1a).
3. **State Land Use Designation.** Urban.
4. **Required Setback.** 25-feet fronts; 15-feet for sides. Section 25-4-42, Corner building sites:
(a) on any corner building site, the interior lines shall be side lot lines and all rear yard regulations shall be inapplicable.

5. **Variance Application.** The applicant/owner submitted the variance application, attachments, filing fee, and associated materials on August 12, 2016. The variance site plan is drawn to scale, prepared by Ronaldo B. Aurelio, L.P.L.S., and denotes the position of the single-family dwelling constructed into the minimum 25-foot front (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 1.4 feet to 2 feet into the 25-foot front (northeast) yard setback.

The encroachment leaves the single-family dwelling with a minimum 23-foot front (northeast) yard setback to a minimum 23.6-foot front (northeast) yard setback,

6. **County Building Records.** Hawai'i County Real Property Tax Office Records indicate that a building permit (0010258) was issued on February 27, 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 26, 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 September 7, 2016 and September 22, 2016, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on September 16, 2016.

9. **Comments from Surrounding Property Owners or Public.**

- a. Objection letter received from Heng Chen, and the Chen family on October 07, 2016. **(See Exhibit B)**

10. **Time Extension.** The applicant's variance application was acknowledged by letter dated September 13, 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 December 16, 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 25-foot northeast side yard setback.

The survey map shows that portion of the single-family dwelling encroaches 1.4 feet to 2 feet into the 25-foot front (northeast) yard setback.

The encroachment leaves the single-family dwelling with a minimum 23-foot front (northeast) yard setback to a minimum 23.6-foot front (northeast) yard setback, in lieu of the required 25-foot front yard setback.

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 15 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 dwelling encroachments constructed into the affected front 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.

Because the encroachment is within the front yard setback, to consolidate the subject property with the roadway and re-subdivide the property to modify property lines and adjust minimum front yard setbacks are not viable options.

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.

A letter of objection was received from Heng Chen, and the Chen Family (see Exhibit B), they state *"the two foot encroachment into the mandated setback may seem small, two feet is an enormous distance in terms of a house this size. Errors in construction should be on the magnitude of inches, and not feet. The current asking price, per square foot, is 348/sq. ft. meaning the "error" will generate tens of thousands of dollars of unzoned, illegal proceeds for the applicant. Granting a variance to this zoning code violation will simply encourage future builders and renovators to similarly flaunt our zoning codes, to the detriment of law abiding owners.*

However, we cannot ascertain that zoning code violations will generate thousands of dollars of unzone, illegal proceeds for the applicant or the granting of variances will simply encourage future builders and renovators to similarly flaunt our zoning codes, to the detriment of law abiding owners.

The variance is for a relief from a front yard setback of the subject property.

The Chen's property is located approximately 458 feet west of the subject property, therefore the encroachment does not directly impact their property.

The 1.4 feet to 2 feet encroachment into the front yard open space still allows for adequate air circulation and exposure to light, as the affected area is within the front yard open adjacent to the roadway frontage.

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 built upon the subject property ("LOT 447") will not meet the minimum front 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.

Donna Duryea
Page 6
December 16, 2016

Should any of the foregoing variance conditions not be complied with, the Planning Director may proceed to declare subject Variance-16-000389 null and void.

Sincerely,

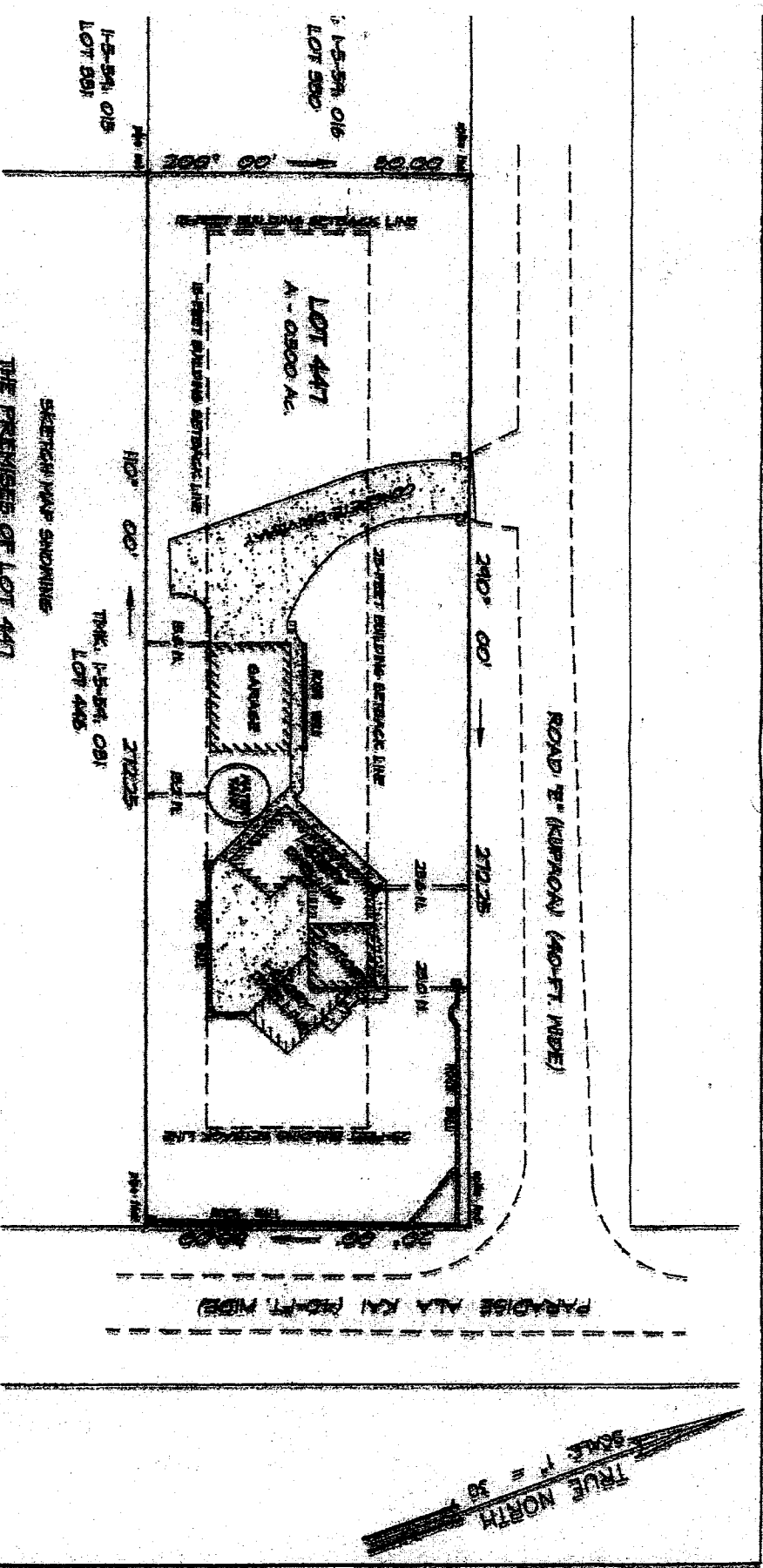


MICHAEL YEE
Planning Director

LHN:nci

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

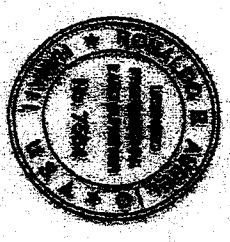


SKETCH MAP SHOWING
THE PREMISES OF LOT 447
HAWAIIAN PARADISE PARK SUBDIVISION
 LAND COURT APPROVED UNDER (APP. 65)
 SITUATED AT KUPUNOU, TOWN, ISLAND OF HAWAII, HAWAII
 TRM, SHT. DR. 1-5-54, 016

The boundary corners, demarcated either vertically or the ground by
 coincidence with the state plane on land court's approved plans, map, etc.
 The Planning Department of the County of Hawaii provided the setback
 information shown above for this project.

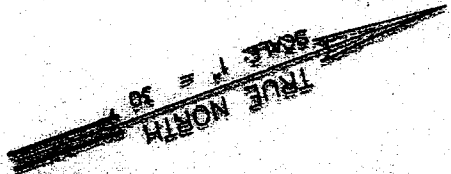
EXHIBIT

DATE: JANUARY 20, 2002
 PREPARED BY: [Signature]



Robert B. Old
 Professional Land Surveyor
 License No. 1000
 State of Hawaii
 Expires April 30, 2004

This work was prepared by
 me or under my supervision.



JANUARY 20, 2002

TMK-1-5-571307

2016 OCT 7 PM 2:03

PLANNING DEPARTMENT
COUNTY OF HAWAII

October 3, 2016

Re: 15-1050 Kupaoa Road, Keaau, HI 96749 TAX MAP KEY: (3) 1-5-111:090
Dear County Building Department,

As owners of a nearby lot, we are writing in strong opposition to the zoning variance being requested by applicant Donna Duryea on behalf of owner Kimberly Ann Snuggerud. While the applicant describes their request as a minor variance, the County Building Department should see this for what it is: an intentional (or at best, grossly negligent) violation of our local zoning ordinances.

While the two foot encroachment into the mandated setback may seem small, two feet is an enormous distance in terms of a house this size. Errors in construction should be on the magnitude of inches, and not feet. The current asking price, per square foot, is \$348/sq ft, meaning this "error" will generate tens of thousands of dollars of unzoned, illegal proceeds for the applicant. Granting a variance to this zoning code violation will simply encourage future builders and renovators to similarly flaunt our zoning codes, to the detriment of law-abiding owners.

The applicant claims that she did not have knowledge of the violation at the time of her purchase. The appropriate remedy for this is a lawsuit for damages against either the previous owner for failure to disclose, or against her building inspector. The duty to discover and remedy this violation rests with one of these private entities; it should not fall to the County Building Department to rescue inattentive owners from their own mistakes. The decision to purchase a half-million dollar home is never undertaken lightly, and failure to complete their due diligence should not be an excuse for this violation.

That said, the applicant contradicts her own argument, stating that this violation is a strong deterrent to potential buyers. In what way? She and her husband bought this home without being deterred by this violation. Does the applicant feel that she and her husband were worse negotiators as buyers, as compared to her negotiation abilities as a seiler? Why would the already-present zoning violation unfairly impact the sale price, when she presumably benefitted from it thirteen years ago? It seems like the applicant is seeking this variance for her personal financial gain, after having already benefitted from the violation during her 2003 purchase.

The applicant cites the extensive work that needs to be done to bring the home into compliance, and we sympathize with the hassle and headache that those renovations would entail. But again, the appropriate remedy can be found against the participants in the 2003 sale, and not in a zoning variance. If the County Building Department feels differently, then it should consider altering the setback provisions for every parcel in its jurisdiction. This would avoid setting an unfortunate precedent of letting violators off the hook (with a profit), since other residents and owners would also be able to enjoy greater use of their parcels. This would also discourage

EXHIBIT

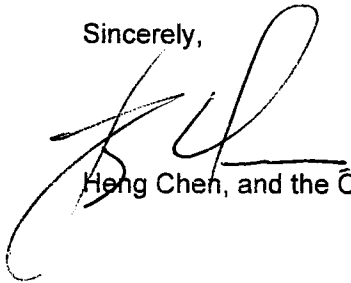
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OCT 10 2016
By: 107963

future, intentional violations, since it leaves open the possibility that the County Building Department would deny a variance. Otherwise, any future construction would be tempted, if not outright encouraged, to flaunt our setback provisions in order to maximize their square footage and profits.

For all of these reasons, we are writing in to express our strong opposition to the requested application for a zoning variance.

Sincerely,



Heng Chen, and the Chen family