

Harry Kim
Mayor



Michael Yee
Director

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Deputy Director

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County of Hawai'i
PLANNING DEPARTMENT

East Hawai'i Office
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June 21, 2017

Peter H. Souza Jr., LPLS
Crossroads Land Surveying, LLC
P. O. Box 7303
Kailua-Kona, HI 96745

Dear Mr. Souza:

SUBJECT: Application: Variance - VAR 17-000420
**Applicant: CROSSROADS LAND SURVEYING, LLC/
PETER SOUZA JR., LPLS**
**Owner: 2008 BURKE TRUST
(JOHN W. BURKE AND KATHY BURKE TRUSTEES)**
**Request: Variance from Chapter 25, Zoning, Article 5 Division 1,
Section 25-5-7 Minimum Yards and Article 4, Division 4,
Section 25-4-44(a) Permitted Projections into Yards and
Open Space Requirements (Encroachment into Southwest
Side Yard Setback and Southwest Side Yard Open Space)**
Tax Map Key: 6-8-026:024 (Lot 24)

The Planning Director certifies the **approval** of Variance 17-000420, subject to conditions. The variance will allow portion of the single-family dwelling to remain on Lot 24, with a minimum 6.60-foot southwest side yard setback in lieu of the minimum required 10-foot side yard setback and associated roof eave projection resulting with a minimum 2.50-foot southwest side yard open space in lieu of the minimum 5-foot side yard 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 25-5-7, Minimum yards and Section 25-4-44 Permitted Projections into Yards and Open Space Requirements.

BACKGROUND AND FINDINGS

1. **Location.** The subject property consists of approximately 14,898 square feet of land, is located within the Waikoloa Village, situated at Waikoloa, South Kohala, Hawai'i. The subject property's street address is 68-3521 Malina Street.

2. **County Zoning.** Single-Family Residential – 10,000 sq. ft. (RS-10).
3. **State Land Use.** Urban.
4. **Setback Requirements.** Flag lot - 10 foot side yards. The minimum yards for all property boundaries of 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, Peter H. Souza Jr., submitted the variance application, attachments, filing fee, and associated materials on March 17, 2017. The variance application's site plan map is drawn to scale and was prepared by Peter H. Souza, L.P.L.S. (Crossroads Land Surveying, LLC), and denotes the single-family dwelling encroaching into the southwest side yard setback and southwest side yard open space.
(See Exhibit A)

The site plan shows that portion of the single-family dwelling encroaches 3.4 feet into the 10-foot southwest side yard setback and the associated roof eave projection encroaches 2.50 feet into the 5-foot southwest side yard open space.

The encroachment leaves the single-family dwelling with a minimum 6.60-foot southwest side yard setback, in lieu of the minimum required 10-foot side yard setback and a 2.50-foot southwest side yard open space, in lieu of the required 5-foot side open space.

6. **County Building Records.** Hawai'i County Real Property Tax Office records indicate that a building permit (B2006-00047K) was issued on January 12, 2006, for the construction of a single-family dwelling consisting of 3 bedrooms, 3-1/2 baths, living room, kitchen and dining area. A subsequent building permit was issued on October 5, 2006 (BK2006-1730K) for an in-ground swimming pool.
7. **Agency Comments and Requirements.**
 - a. The State Department of Health (DOH) memorandum dated April 5, 2017: "The Health Department found no environmental health concerns with regulatory implications in the submittals."
 - b. No comments received from Department of Public Works Building Division (Kona).
8. **Notice to Surrounding Property Owners.** The applicant submitted a copy of notice mailed to surrounding property owners (including affidavits) by U.S.P.S. According to these submittals, the first notices were mailed on March 17, 2017, and the second notices were mailed on May 27, 2017. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on April 10, 2017.

9. **Time Extension.** The applicant's variance application was acknowledged by letter dated March 29, 2017 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 June 26, 2017.
10. **Comments from Surrounding Property Owners or Public.** No written comments or objections from surrounding property owners, or general public were received by the Planning Department.

GROUNDS FOR APPROVING VARIANCE

Special and Unusual Circumstances

- (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 southwest side yard setback and associated roof eave projection into the 5-foot southwest side yard open space.

The site plan prepared by Peter H. Souza, Jr., L.P.L.S., shows that portion of the single-family dwelling encroaches 3.4 feet into the 10-foot southwest side yard setback and the associated roof eave projection encroaches 2.50 feet into the 5-foot southwest side yard open space.

The encroachment leaves the single-family dwelling with a minimum 6.60-foot southwest side yard setback, in lieu of the minimum required 10-foot side yard setback and a 2.50-foot southwest side yard open space, in lieu of the required 5-foot side 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. The single-family dwelling was built under Building Permit BK2006-0047K, issued on January 1, 2006, with final inspection issued and approved on April 9, 2007. It also appears that past building permit inspections of the premise 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 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 re-subdivide 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 was 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 existing single-family dwelling on the subject property ("LOT 24") does not meet the minimum southwest side yard setback requirement pursuant to Hawai'i County Code, Chapter 25, Zoning.

This variance request is **approved** subject to the following 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. An Ohana or farm dwelling 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.
4. 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.
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.

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Should any of the foregoing variance conditions not be complied with, the Planning Director may proceed to declare subject Variance-VAR 17-000420 null and void.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael Yee".

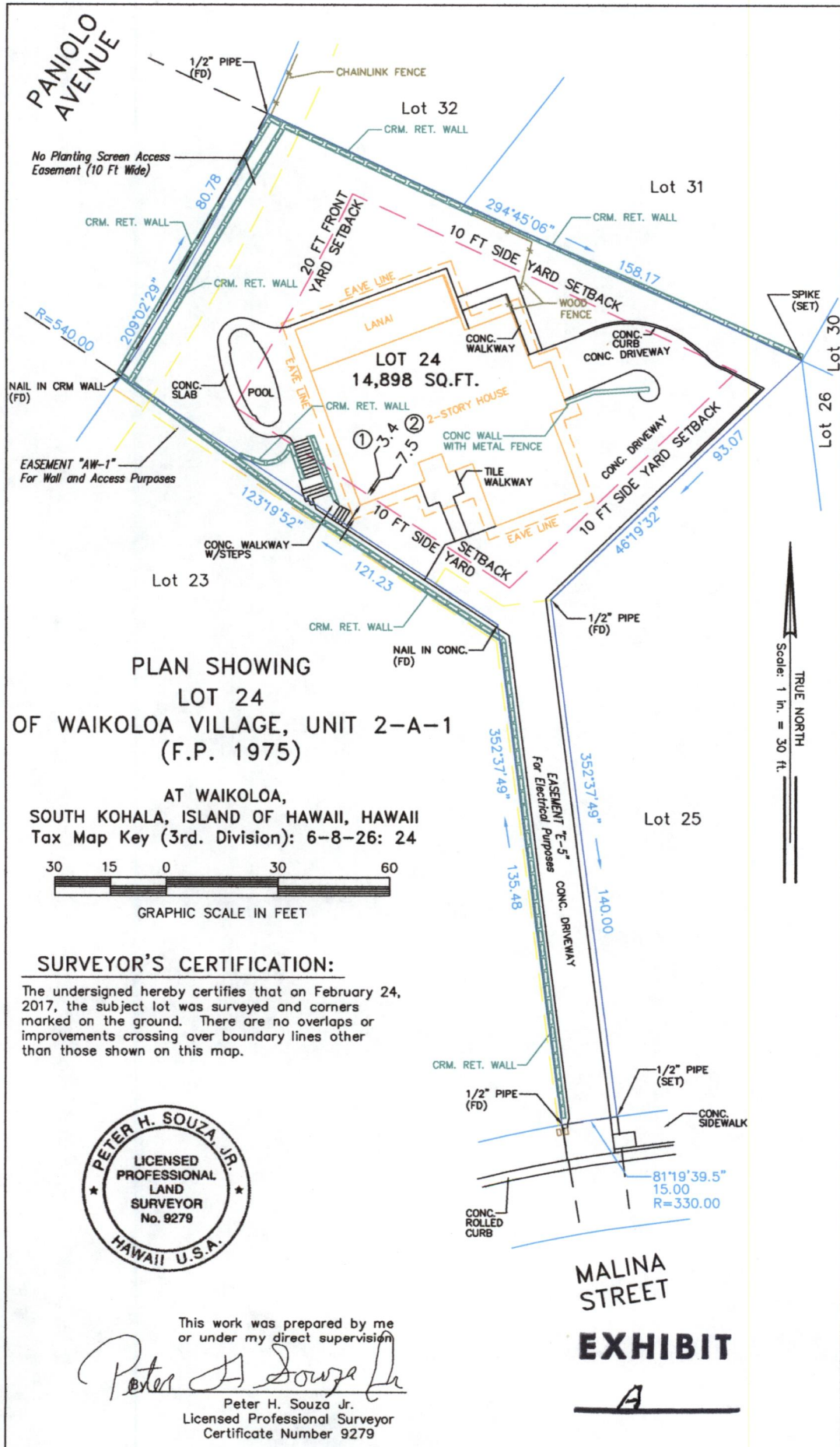
MICHAEL YEE
Planning Director

LHN:nci

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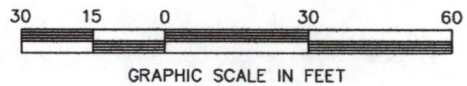
Enclosure: Exhibit A

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



**PLAN SHOWING
LOT 24
OF WAIKOLOA VILLAGE, UNIT 2-A-1
(F.P. 1975)**

AT WAIKOLOA,
SOUTH KOHALA, ISLAND OF HAWAII, HAWAII
Tax Map Key (3rd. Division): 6-8-26: 24



SURVEYOR'S CERTIFICATION:
The undersigned hereby certifies that on February 24, 2017, the subject lot was surveyed and corners marked on the ground. There are no overlaps or improvements crossing over boundary lines other than those shown on this map.



This work was prepared by me
or under my direct supervision
Peter H. Souza Jr.
Peter H. Souza Jr.
Licensed Professional Surveyor
Certificate Number 9279

MALINA STREET
EXHIBIT
A

