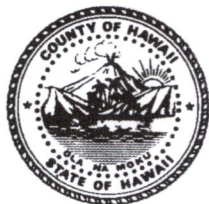


Harry Kim  
Mayor



Michael Yee  
Director

Daryn Arai  
Deputy Director

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**County of Hawai'i**  
PLANNING DEPARTMENT

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September 12, 2017

Daryl Smith  
HTS Company  
P.O. Box 180271  
Hawaii National Park, HI 96718

Dear Mr. Smith:

**SUBJECT: Application: Variance - VAR 17-000422**  
**Applicant: HTS COMPANY/DARYL SMITH**  
**Owner: SAMUEL E. LORCH**  
**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 West Rear Yard Setback**  
**and West Rear yard Open Space)**

**Tax Map Key: 2-7-007:004**

The Planning Director certifies the **approval** of Variance 17-000422, subject to conditions. The variance will allow a portion of the single-family dwelling constructed on the subject property with a minimum 26.8-foot west rear yard setback, in lieu of the required 30-foot west rear yard setback requirement and associated roof eave projection resulting in a 7.06-foot west rear yard open space in lieu of the required 24-foot open space requirement. It also allows for the gazebo constructed upon the subject property to remain with a minimum 14.95-foot to a minimum 20-foot west rear yard open space in lieu of the required 24-foot west rear yard open space requirement. These exceptions are in lieu of the requirements in 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, consisting of approximately 5.958 acres of land, is situated at Puumoi, South Hilo, Hawai'i. The subject property's address is 27-530 Indian Tree Road.

2. **County Zoning.** Agricultural – 20 Acres (A-20a).
3. **State Land Use Designation.** Agricultural.
4. **Setback Requirements.** 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 November 10, 2016. The variance application's revised survey map dated August 17, 2017 is drawn to scale and prepared by Niels Christensen, LPLS (The Independent Hawaii Surveyors, LLC) and denotes that a portion of the single-family dwelling roof eave projection and detached gazebo built into the rear (west) yard open space. **(See Exhibit A- Site Plan)**

The revised survey map dated August 17, 2017 shows that a portion of the single-family dwelling constructed on the subject property encroaches 3.2 feet into the 30-foot west rear yard setback and the associated roof eave encroaches 16.94 feet into the west rear yard open space.

The encroachment leaves the single-family dwelling with a minimum 26.8 feet west rear yard setback, in lieu of the required 30-foot rear yard setback and associated roof eave projection resulting with a 7.06-foot west rear yard open space, in lieu of the required 24-foot open space requirement. It also leaves the gazebo with a 14.95 feet to a minimum 20-foot west rear yard open space, in lieu of the required 24-foot open space requirement.

6. **County Building Records.** Hawai'i County Real Property Tax Office records indicate that a building permit (B-2005-3375H) was issued on December 7, 2005 and finalized on February 2, 2007 for the construction of a single-family dwelling consisting of 3 bedrooms, 3 baths, living room, kitchen, dining area, garage and workshop. A subsequent building permit (B2006-3206H) was issued on December 14, 1992 and completed on March 21, 2016 for the construction of a detached Gazebo, constructed above an in-ground water catchment.
7. **Agency Comments and Requirements.**
  - a. State Department of Health (DOH) memorandum dated June 6, 2017: "Wastewater Branch is unable to make comments to the proposed project at this time. Before we can offer any comments, the applicant needs to address the following: the location of all existing wastewater system."
  - b. Department of Public Works Building Division memorandum dated May 15, 2017: "Reviewed with no comment".
8. **Public Notice.** The applicant filed a transmittal letter with copy of the notices sent to surrounding property owners via USPS. According to the notarized affidavits, the first and



second notices were mailed on April 20, 2017 and May 16, 2017, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on May 18, 2017.

9. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. No written comments or objections from surrounding property owners of the general public were received.
10. **Time Extension.** The applicant's variance application was acknowledged by letter dated May 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 September 15, 2017.

### 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 criterion (a) for the following reasons:**

The owner/applicant submitted the variance application to address or resolve the proposed encroachment of the single-family dwelling and gazebo constructed into the 30-foot west rear yard setback and 24-foot west rear 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 single-family dwelling addition constructed in 2005, nearly 12 years ago, and subsequent construction permits issued by the County for the existing single-family dwelling, closed under valid building permits. It also appears that past building permit inspections of the premises by the affected agencies, during construction of the dwelling improvements, did not disclose any building encroachment issues or building setback irregularities at that time.

The owner was not at fault in creating the encroachment violation and requiring them to fix the encroachments would not be practicable when the owners complied and secured all necessary building permits from the County. Further, there is a gulch which aligns with the west rear yard boundary that provides a buffer for the adjacent property. Thereby, added costs to relocate the dwelling and gazebo outside of the setback would not increase the separation that the gulch already provides. These special and unusual physical land features would minimize impact of the single family dwelling and gazebo to the adjacent property owner.

## **Alternatives**

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

### **The Variance application meets criterion (b) for the following reasons:**

Alternatives available to the current owners to correct and/or address the building encroachments of the single-family dwelling and gazebo constructed into the 30-foot west rear yard setback and 24-foot west rear yard open space are limited.

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 and gazebo 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 and diminish the overall functionality of the single-family dwelling. It should be noted that there is a gulch runs along the rear boundary.

Another alternative is to consolidate the subject property with the adjoining side property which is owned by another party, and to re-subdivide the property to modify property lines and adjust minimum yard setbacks. Because the encroachment is within the rear yard setback, to consolidate the subject property with the adjacent property, which is owned by someone else, and re-subdivide the property to modify property lines and adjust minimum rear yard setbacks are not viable options. There are no other reasonable alternatives to resolve the encroachment issue.

## **Intent and Purpose**

**(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 criterion (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.

No objections were received from surrounding property owners.



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.

The single-family dwelling and gazebo 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. 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 site plan, the existing single-family dwelling and gazebo on the subject property is allowed to remain and will not meet the minimum rear 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 Hawaii 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. The applicant shall submit to the State Department of Health (Hilo) a site plan showing the location of all existing wastewater system within six month of the date of this variance.
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. 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.
6. All future structural additions to the dwelling shall be in compliance with all zoning code requirements and no other setback variance shall be considered for any development of this property.

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7. 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 initiate proceedings to null and void Variance-17-000422

Sincerely,



MICHAEL YEE  
Planning Director

LHN/SG:nci

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