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Mayor



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County of Hawai'i
PLANNING DEPARTMENT

Last Hawai'i Office
101 Pauahi Street, Suite 3
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January 30, 2018

Mr. Donald Eikenberry
87-3200 Datura Road
Captain Cook, HI 96704

Dear Mr. Eikenberry,

SUBJECT: Application: Variance - VAR 17-000453
Applicant: RICHARD BOSSELMANN
Owners: DONALD EIKENBERRY
Request: Variance from Chapter 25, Zoning, Article 5, Division 1,
Section 25-5-7, Minimum Yards, and Section 25-4-44,
Permitted Projections into Yards and Open Space
Requirements (Encroachment into South Side Yard Setback
and open space)
Tax Map Key: (3) 8-7-016: 013

NOTE: County of Hawai'i Planning Department was notified by Mr. Richard Bosselmann, applicant, that Ownership of TMK 8-7-016: 013 was changed on December 01, 2017, from the Maletic Family Trust to Mr. Donald Eikenberry.

The Planning Director certifies the **approval** of Variance No. 17-000453, subject to variance conditions. The variance will allow portions of the dwelling wall and roof overhang to remain with minimum 7.59-foot wall setback on the side (south) yard 8'-0" setback (this 0.47' encroachment is within the De Minimis structure position discrepancy of 0.75', but is included in this variance request). Also the 3.02-foot open space on the roof on the side (south) yard setback encroaches 0.98' into the 4.0' open space. This 0.98' encroachment includes 0.45' for the rain gutter which is needed for rain catchment for the property. If the rain catchment gutter was removed, the encroachment would be 0.53' which would also be within the DeMinimus structure position discrepancy of 0.75' for Agriculture. These exceptions are in lieu of the required 8-foot side yard setback, and 4.0' open space as required by the Hawai'i County Code, Chapter 25, Zoning, Section 25-5-7, Minimum yards requirements.

BACKGROUND AND FINDINGS

1. **Location.** The subject property, TMK (3) 8-7-016: 013, contains approximately 7,500 square feet and is situated within the Kona Paradise Subdivision, South Kona, Hawai'i. The subject property's street address is 87-3200 Datura Road, Captain Cook, HI 96704.
2. **County Zoning.** A-5a
3. **State Land Use Designation.** Agricultural
4. **Setback Requirements.** 15 feet front & rear and 8 feet for sides.
5. **Variance Application.** The applicant/owner submitted the variance application, attachments, filing fee, and associated materials on November 17, 2017. The variance application's survey map dated October 31, 2017 was prepared by Pattison Land Surveying, Inc. and denotes that portions of the dwelling wall and roof are built into the side (South) yard setback and or open space. **(See Exhibit A-Site Plan Survey)**

The survey map dated October 31, 2017, shows one section of the dwelling walls encroaching with minimum 7.59-foot side (south) yard setback, in lieu of the required 8-foot side yard setback. The survey map also shows one section of the dwelling roof encroaching with a minimum 3.02-foot side (south) yard setback, in lieu of the required 4 foot open space setback.

6. **County Building Records.** Hawai'i County Real Property Tax Office records indicate that a building permit (B2006-0082K) was issued on January 19, 2006 for a two story single-family dwelling consisting of 3 Bedrooms, 2 1/2 Baths, Great Room, Kitchen, Laundry, (1) Water Tanks and Lower 2 Car Garage.
7. **Agency Comments and Requirements.**
 - a. Comments dated December 08, 2017, from the State Department of Health (DOH), indicated that there are no environmental health concerns.
 - b. No comments were received from Department of Public Works - Building Division as of this date.
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 November 21, 2017 and December 12, 2017 respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on December 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 or the general public were received.
10. **Time Extension.** The applicant's variance application was extended from January 15, 2018 to January 30, 2018.

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 unintentional encroachment of the dwelling wall and roof overhang into the 8-foot (south) side yard setback and the 4-foot open space as required by the Zoning Code.

The survey map dated October 31, 2017, shows a section of the dwelling wall encroaching into the side yard (south) setback a total of 0.41' in lieu of the required 8-foot side yard setback and a portion of the roof overhang encroaching into the side yard (south) 4-0' open space a total of 0.98'.

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 August 2007, over 10 years ago. 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.

Except for the rain gutter, the encroachments would meet the De Minimis standards for Agriculture, an encroachment of 0.75'.

The above special and unusual circumstances determine the owner was not at fault in creating the encroachment violation and requiring them to fix the encroachments would interfere with best use and development of the subject property.

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 constructed into the affected side yard of the subject property include the following actions:

Remove the portion of the rain gutter encroachments into the open space. 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. The rain gutter system is for water catchment and loss of a section of the catchment area would reduce the amount water for the property.

Therefore, there are no 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 building setbacks for a lot 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 dwelling has been in existence for approximately 10 years and 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.

This can be substantiated, to some degree, by the fact that no comments or objections were received from the surrounding property owners or general public in response to the Notification of Surrounding Properties Owners.

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 on the subject property (TMK: 8-7-016: 013) will not meet the minimum side yard requirements or open space 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 dwelling walls 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. 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-17-000453.

Any questions may be directed to this office, attention Terry Dunlap at (808) 323-4770.

Sincerely,



MICHAEL YEE
Planning Director

Donald Eikenberry (Variance 17-000453) TMK 8-7-016: 013

January 30, 2018

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TKD: tkd: \\coh141\planning\Staff\Terry\AAA-REVIEWS\VARIANCE TMK-8-7-016-013 Eikenberry\Final Approval letter Variance 17-000453.doc

xc: Natalie Whitworth DPW Engineering Division
Real Property Tax Office (Kona)
Gilbert Bailado, GIS

Richard Bosselmann
76-5903 Mamalahoa Highway
Holualoa, HI 96725

OLD REPUBLIC TITLE & ESCROW OF HAWAII - Kona Branch
75-5722 Kuakuni Hwy Suite No. 215, Kailua-Kona, HI 96740
Fax No. 327-3705 and Phone No. 327-3700

ATTENTION: Escrow Officer: Jodie Feltmann
Escrow No.: 6825006592-JF
Seller to Buyer: Maletic to Eikenberry
Location: 87-3200 Datura Road, Captain Cook, Hawaii 96704

SURVEY REPORT

LOT NO. 96
of "KONA PARADISE SUBDIVISION"
Being a Portion of Mahele Award No. 25, Royal Patent No. 7739 to Nahua
At Kaohe 4th, South Kona, County, Island & State of Hawaii
TMK No. (3)8-7-016:013

I performed a K-2 survey of the subject property on October 28th, 2017 and found the existing improvements in the vicinity of the lot boundary lines and setback areas as shown on the accompanying map. For your added information, the County setback codes are as follows:

Front & Rear Setbacks.....Fifteen (15) feet
Side Setbacks.....Eight (8) feet

According to County code, roof overhangs may protrude into the setback up to four [4.00] feet on the sides and up to five [5.00] feet on the front and rear yards.

Upon study of the survey, I found two County setback violations. As the accompanying map shows a South corner of the residence is 7.54 feet from the South (side) boundary line, being a violation of 0.41 of a foot. Also, a South Eaves (overhang) corner is 3.02 feet from the South (side) boundary line, being a violation of the projection setback of 0.98 of a foot. The Setback violations may fall under De Minimis Structure Position Discrepancy of Hawaii County Code, Zoning Code Division 7 Section 25-4-66 thru Section 25-4-71.

The Southeast residence corner is 8.94 feet from the South (side) boundary line. Please see the accompanying map for more information, not mentioned in this report.

No boundary encroachments were found. The CRM (concrete, rock, masonry) wall along the West boundary line that is in the road was built for retaining purposes by the Homeowners Association. Please see the accompanying map for more information, not mentioned in this report.

The features and distances shown between lot lines are based on selected found boundary monuments and acceptable tolerances for properties in this area and age of the original survey. Please note that four [4] of the four [4] recognized original boundary corners were found as noted on the accompanying map. The Southeast boundary corner was set as noted.

NOTE: Please refer to the accompanying map for all information pertaining to this report.



Thomas G. Pattison
L.P.L.S. No. 10743
Kamuela, Hawaii 96743
October 31st, 2017
Job No. 17432

**MAP SHOWING EXISTING CONDITIONS UPON
LOT NO. 96**
of the "KONA PARADISE SUBDIVISION"
Portion of Mahele Award No. 25, Royal Patent 7739 to Nahua
Being a Portion of Subdivision Map 1313-Revised at Kaohe 4th,
South Kona, County of Hawaii Island of Hawaii and State of Hawaii
TMK No. (3) 8-7-016:013

TRUE NORTH

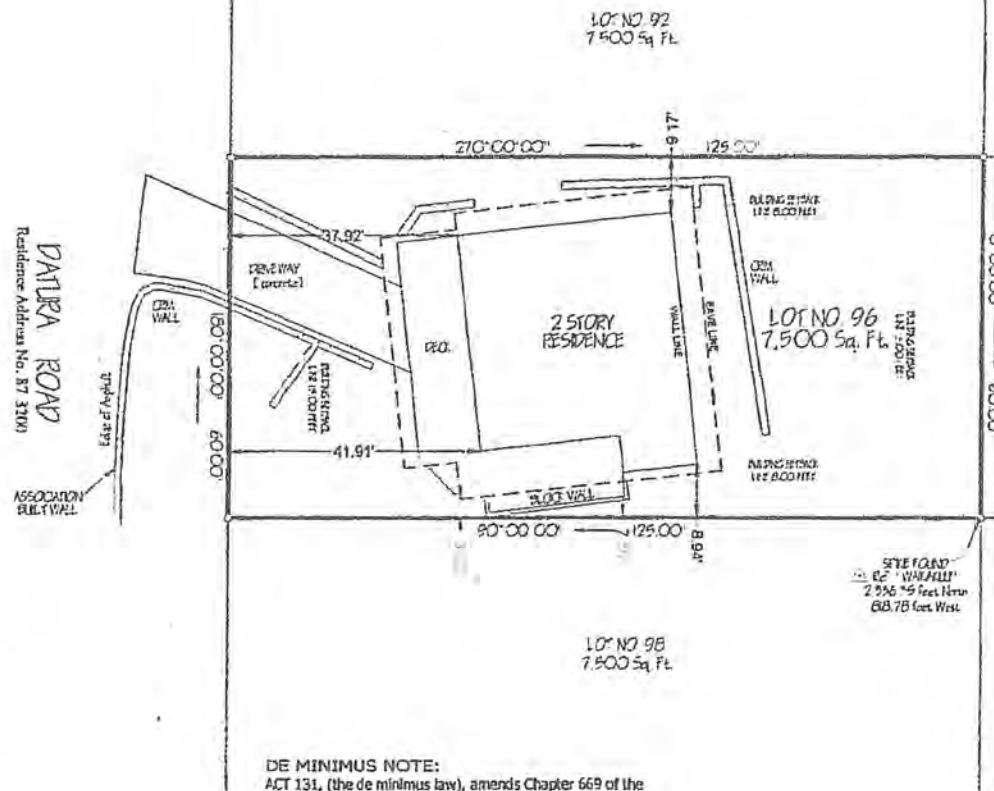


SCALE ONE INCH
EQUALS 20.00 FEET
Graphical Scale is in Feet

NOTE: BASIS OF AZIMUTH DERIVED
USING HEMISPHERE GPS RIX SYSTEM

NOTE: ALL CORNERS ARE FOUND
5" REINFCES IN CONCRETE
UNLESS OTHERWISE NOTED

NOTE: ALL AZIMUTHS & DISTANCES
ARE SHOWN & MAPPED HEREON
IN A CLOCKWISE DIRECTION



- NOTES:**
- 1) No boundary encroachments were found.
 - 2) Violations of setbacks and other building restrictions were found.
 - 3) The distances shown between the property lines & the features shown hereon, are based on selected found boundary monuments & acceptable measurements for properties of this type.
 - 4) The features, shown hereon, were located by an actual survey performed on the ground on October 7, 2017.
 - 5) See accompanying report pertaining to setbacks and encroachments.
 - 6) CRM = Concrete, Rock & Masonry Wall.

LEGEND

| | |
|--|---------------|
| | CONCRETE |
| | CRM WALL |
| | OVERHEAD VIEW |

Setback Lines are shown from current data, but should be verified by outsider. The description on this plat was provided to us by the client, and does not guarantee ownership, and should be compared to your Deed, Abstract or Certificate of Title. All building restrictions, building lines and easements may or may not be shown. Check your Deed, Abstract, Title Report, and local ordinances, no responsibility is assumed by Surveyor. Compare all points before building by same and report any discrepancy at once. Dimensions are shown in feet and decimal parts thereof, no denotation is to be assumed by scaling.

DE MINIMUS NOTE:
ACT 131, (the de minimus law), amends Chapter 669 of the Hawaii Revised Statutes to allow certain legally constructed improvements not to be considered encroachments if they are over the lot line. In addition, the County of Hawaii has adopted Ordinance No. 02 70 on May 30, 2002, relating to the de minimus structure position discrepancy with regards to setbacks. This firm suggests that the parties involved discuss the findings of our survey with their real estate attorney(s) to ascertain if either of the de minimus laws apply.

I, Thomas G. Pattison, do hereby certify that this map is an accurate representation of a survey as made on the ground, by me, or under my direct supervision and that there are no apparent or visible encroachments or easements, known to me, except as shown and mapped hereon.

-COPY-

THOMAS G. PATTISON
Hawaii License No. 10743
October 31st, 2017--Job 17432

PATTISON LAND SURVEYING, INC.

115-11241000, Kona, HI 9000 • Unit 500
Kona, HI 90000 • Phone 734-3019

EXHIBIT "A" SITE PLAN SURVEY