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County of Hawai'i
PLANNING DEPARTMENT

East Hawai'i Office
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November 30, 2018

Billy Dale Lato
HC 1 Box 417
Kea'au, Hawai'i 96749

Dear Mr. Lato:

SUBJECT: Application: Variance - VAR 18-000457
Applicant: BILLY DALE LATO
Owner: BILLY DALE LATO AND DORMA AYAME LATO
**Request: Variance from Chapter 25, Zoning, Article 5 Division 7,
Section 25-5-76 Minimum Yards, Article 4, Division 4,
Section 25-4-44(a) Permitted Projections into Yards and
Open Space Requirements (Encroachment into Northeast
Rear Yard Setback and Southeast Side Yard Setback)**
Tax Map Key: 1-5-036:030 (Lot 136)

The Planning Director certifies the **approval** of Variance 18-000457, subject to conditions. The variance will allow portions of the "as-built" storage shed to remain with a minimum 5'10" (northeast) rear yard setback and associated roof eave projection resulting in a 4'10" rear (northeast) yard open space in lieu of the minimum 30' rear yard setback and 24' rear yard open space requirement. It will also allow for the "as-built" storage shed to remain with a minimum 7' (southeast) side yard setback and associated roof eave projection resulting in a 6' side (southeast) yard open space requirement in lieu of the minimum 20' side yard setback and 14' side yard open space requirement. These exceptions are in lieu of the required 30' rear yard setback and 20' side yard setback 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.

1. The dwelling structure situated on the subject parcel, was moved from a parcel located in Leilani Estates, due to the lava flow. This structure shall not be occupied for habitable use and shall be removed or relocated to another site within six months from the date of the issuance of this variance.

BACKGROUND AND FINDINGS

1. **Location.** The subject property consist of approximately one acre (43,560 sq. ft.) and is located in the Hawaiian Paradise Park Subdivision, Keaau, Puna, Hawai‘i. The subject property’s street address is 15-1333 Palapalai Street (27th Avenue).
2. **County Zoning.** Agricultural – 1 acre. (A-1a).
3. **State Land Use Designation.** Agricultural.
4. **Required Setback.** 30 feet front and rear; 20 feet for sides.
5. **Variance Application.** The applicant/owner submitted the variance application, attachments, filing fee, and associated materials on December 14, 2017. The variance site plan is drawn to scale, prepared by the applicant and denotes the position of the 936 s. ft. storage shed constructed into the minimum 30’ rear (northeast) yard setback and 20’ side (southeast) yard setback. The request affects the rear (northeast) yard setback and the 20’ side (southeast) setback requirements. **(See attached survey map – Exhibit A)**

The site plan shows that portion of the “as-built” 936 sq. ft. storage shed encroaches 24’2” into the 30’ rear (northeast) yard setback and 13’ into the 20’ side yard setback. The encroachment leaves the “as-built” storage shed with a minimum 14.43’ rear (northwest) yard setback, in lieu of the required 20’ rear yard setback

6. **County Building Records.** Hawai‘i County Real Property Tax Office records indicate that Building Permit #02614 was issued on May 14, 2002, and finalized on December 29, 2016, to the subject property, for a single-family dwelling consisting of 3 bedrooms, 2 baths, living room, kitchen, dining area, carport and doughboy water tank. A subsequent Building Permit #030613 was issued on March 24, 2003, for a 20’ x 28’ garage with storage and bath; and a 28’ x 20’ tool shed with storage and ½ bath. This building permit remains open.
7. **Agency Comments and Requirements.**
 - a. State Department of Health (DOH) memorandum dated January 26, 2018: “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 combined into one notice and mailed on February 1, 2018. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on August 31, 2018.

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

a. Objection letter received from Angela Ali dated February 13, 2018. (See Exhibit B)

10. **Time Extension.** The applicant's variance application was acknowledged by letter dated January 12, 2018, and additional time to review the application was required. The applicant granted the Planning Director an extension of time until November 30, 2018, for decision on the Variance Application.

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 "as-built" storage shed built into the 30' northeast rear yard setback and into the 20' southeast side 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. The applicant has cited in his background report that he was informed by a county official that a building permit was not required for storage shed not fitted for electrical and plumbing systems. Therefore, he was under the impression that the "as-built" storage shed was in compliance with all county codes.

Based on the above-mentioned information, special and unusual circumstances do exist to an extent that the owners complied with all building permit requirements.

- (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 "as-built" storage shed encroachments constructed into the affected rear and side yard setback of the subject property include the following actions:

Remove the building encroachments and/or relocate the "as-built" storage shed denoted on the site plan to fit within the correct building envelope as prescribed by the Zoning Code. Any structural or design correction of the "as-built" storage shed to meet setback requirement would leave unattractive reconstruction scars.

This alternative would be deemed unreasonable, especially when the owner relied on the county building official for placement of the “as-built” storage shed and that building permits were not required, and was under the impression that the “as-built” shed was in compliance with all County requirements.

Another alternative is to consolidate the subject property with the adjoining rear and side yard properties 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 setback are not a viable options. Therefore, there are no other 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.

One letter of objection was received expressing concerns to the approval of the variance application. The objection from Angela Ali cites various concerns in her objection letter. **(See attached Objection Letter – Exhibit B)**

It should be noted that Ms. Ali was granted a setback variance on June 5, 2017, similar to the variance application the applicant is requesting. In her objection letter, Ms. Ali also cites the following: *“Any approval or support from me is conditional upon Mr. Lato building a six-foot tall rock wall between his property and my property from the concrete building at the back of his property forward for at least 50 feet in length pass my AG SHED.”*

In an email sent to staff Planner, Larry Nakayama, Mr. Lato states that he has erected a 6’ high rock wall and 52’4” in length, along the southeast side boundary and 74’ along the rear boundary. **(See attached e-mail – Exhibit C)**

The owner of the adjacent rear property did not file an objection to the variance application.

The variance addresses only the setback violation, any other concerns regarding building permits should be referred to the appropriate government agencies as cited above. A Building Permit will be required to bring the “as-built” storage shed into compliance with the Department of Public Works – Building Division requirements.

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. 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 agricultural storage shed built on the subject property ("LOT 136") will not meet the minimum rear yard setback requirement pursuant to Hawai'i County Code, Chapter 25, Zoning.

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 "as-built" 936 sq. ft. agricultural shed 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. The applicant shall secure a building permit within six months to bring the storage shed into compliance with the Department of Public Works – Building Division requirements.
5. The agricultural sheds shall not be converted for habitable use and shall remain for agricultural use only.

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6. The dwelling structure situated on the subject parcel was moved from a parcel located in Leilani Estates, due to the lava flow. This structure shall not be occupied for habitable use and shall be moved to another parcel within six months from the date of the issuance of this variance.
7. 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.
8. 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-18-000457 null and void.

Sincerely,



MICHAEL YEE
Planning Director

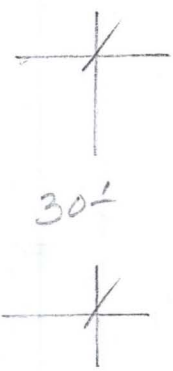
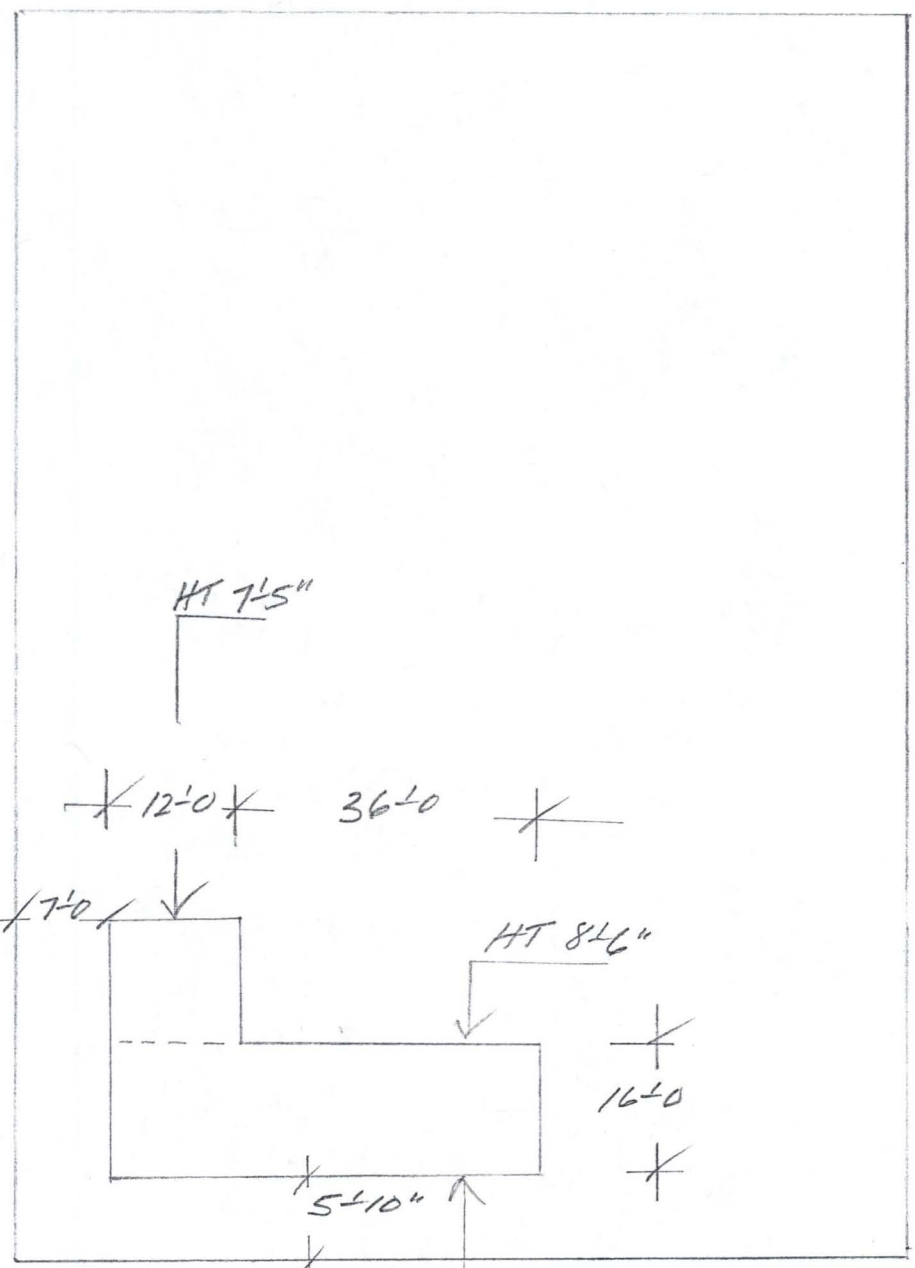
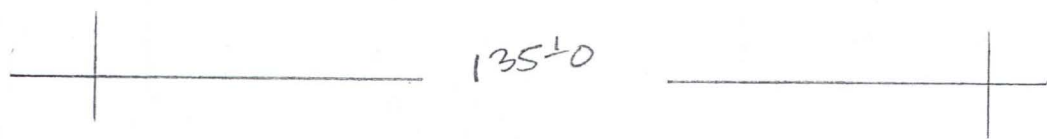
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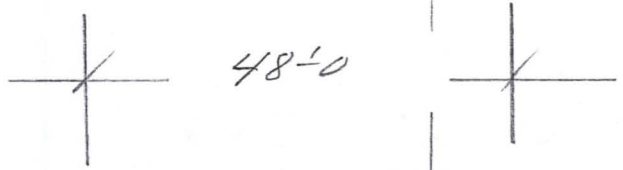
Enclosures: Exhibit A - Survey Map
Exhibit B - Objection Letter
Exhibit C - Email

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

OR9



322±8"



HT 7'-5"

EXHIBIT
A

To: Michael Yee, Director
CC: Larry Nakayama

February 13, 2018

Subject: Response to Leto's request for Variance

Subject Property: his name and address

Mr. Yee,

Previously two of my neighbors had reported a property violation to the Planning Department and refused to "approve" a variance on my property. The apparent violation is that my AG SHED is within the set back. I appealed this based upon having licensed businesses construct the AG SHED and they should have known the regulations. I was trying to save the original Farias orchard on my property-- well known orchard designer. I appreciate that you and your department did approve my variance due to, no fault of my own, the AG SHED was built in violation of the code.

Mr. Leto directly next door to me was one of the neighbors who reported me and also vehemently opposed the variance for my property. Mr. Leto has a similar and more severe violation as he has a building in one corner of the property clearly on the intersecting property lines and by his own admission, is operating a baseyard on that property. See the attached photos and maps.

As I previously stated in my appeal, I am trying to sell this property because my neighbors constantly harass me, threatened me and scream obscenities at me, a single woman, and they have shot and injured two of my dogs in my own yard. They typically get drunk and cause lots of noise. Every time a prospective buyer comes to see my property, they ask What IS THAT NEXT DOOR? This inhibits my ability to sell.

I have called the Police twice his week alone because the juveniles shoot B-B guns at my shed and a metal trough which makes lots of noise scaring my dogs and stressing me. They have also attempted to shoot my dogs and have previously thrown lit fireworks over the fence injuring my dogs. As many times as the police go to talk to them, they start again as soon as the police leave.

Sir, I fear for my life and the lives of my animals, so I WILL NOT file a complaint against them. However, I do want you to know the facts with the hope that you will grant a variance for my property and I can sell it and move.

Any approval or support from me is conditional upon Mr. Leto building a six-foot tall rock wall between his property and my property from the concrete building at the back of his property forward for at least 50 feet in length past my AG SHED.

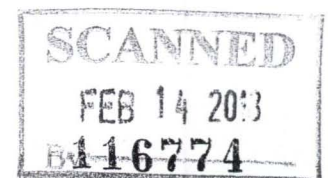
Angie Ali

Osolicious Orchards

(320) 200 8480

EXHIBIT

B



2018 FEB 14 PM 12:07
PLANNING DEPARTMENT
COUNTY OF HAWAII

Nakayama, Larry

2018 JUL 2 AM 9:30

From: Bojay <latob002@yahoo.com>
Sent: Sunday, July 01, 2018 6:34 PM
To: Nakayama, Larry
Subject: Re: Variance

PLANNING DEPARTMENT
COUNTY OF HAWAII

Larry
The back wall is 74 feet and Ali side of the wall is 52'-4"
By the way I thought her shack is a farm house none liveable she's living in there 24/7 with her 24 dogs
You guys asking me to do a lot and I'm doing it but how come she can live in there and demand a lot out of me when she's not supposed to be there living in the house
I was told by the building department it's a none live able a farm shack
Please let me know what's going on
Thanks
Bojay Lato 960-4472

Sent from my iPhone

On Jul 1, 2018, at 5:22 AM, Bojay <latob002@yahoo.com> wrote:

Larry it's 52'-4" long on her side

Sent from my iPhone

On Jun 28, 2018, at 9:17 AM, Nakayama, Larry <Larry.Nakayama@hawaiiicounty.gov> wrote:

Mr. Lato: Can you let me know the length of the rock wall along the Side and rear boundary. Ms. Ali is requesting length 50 ft. along her boundary.

Mahalo: Larry

Larry H. Nakayama
Planner
Hawaii County Planning Department
101 Pauahi Street, suite 3
Hilo, Hawaii 96720
Phone: (808) 961-8149
e-mail: Larry.Nakayama@hawaiiicounty.gov

EXHIBIT

C



