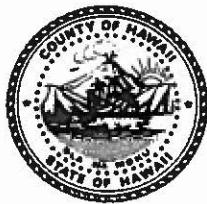


Harry Kim  
Mayor



Michael Yee  
Director

Duane Kanuha  
Deputy Director

West Hawai'i Office  
74-5044 Ane Keohokalole Hwy  
Kailua-Kona, Hawai'i 96740  
Phone (808) 323-4770  
Fax (808) 327-3563

**County of Hawai'i**  
**PLANNING DEPARTMENT**

East Hawai'i Office  
101 Pauahi Street, Suite 3  
Hilo, Hawai'i 96720  
Phone (808) 961-8288  
Fax (808) 961-8742

February 28, 2019

Stefan Folkendt Jr.  
73-1414 Hamiha St.  
Kailua-Kona, HI 96740

Dear Mr. Folkendt:

**SUBJECT: Application: Variance - VAR 19-000502**  
**Applicant: STEFAN FOLKENDT JR.**  
**Owners: STEFAN FOLKENDT JR.**  
**ELIZABETH FOLKENDT**  
**Request: Variance from Chapter 25, Zoning, Article 5, Division 1,**  
**Section 25-5-76, Minimum Yards Requirements**  
**(Encroachments into Southeast Rear Yard Setback)**  
**Tax Map Key: 7-3-047:057**

**The Planning Director certifies the approval of Variance No. 19-000502, subject to variance conditions.** The variance will allow portions of the Single-family Dwelling AND Ohana Dwelling to remain "as-built." A minimum 18.7 feet (south) side yard setback for what is considered the Single-family Dwelling and a minimum 19.6 feet (south) side yard setback for what is considered the Ohana Dwelling. This is in lieu of the required 20-foot side yard setback, as required by the Hawai'i County Code, Chapter 25, Zoning, Section 25-5-76, Minimum yards requirements.

**BACKGROUND AND FINDINGS**

- 1. Location:** The subject property, Lot 57, contains approximately 61,332 square feet and is situated within the "Kona Heavens Subdivision", Unit I & II, Kaloko, North Kona, Hawai'i. The subject property's street address is 73-1414 Hamiha, Kailua-Kona, HI 96740.
- 2. County Zoning:** Agricultural (A-1a).
- 3. Lot Creation Date:** Subdivision No. 3478-a, 09/20/1977
- 4. State Land Use Designation:** "Agricultural".

5. **Setback Requirements:** 30 feet for north and east front yards and 20 feet for west and south side yards. Pursuant to Sect. 25-4-40(b) and Sect. 25-4-42(a), this building site has front yards where there are street frontages; since this is a corner building site, the interior lines are side yard lot lines, and there are no rear yards.
6. **Variance Application:** The applicant/owner submitted the variance application, attachments, filing fee, and associated materials on January 10, 2019. The variance application's survey map dated January 5, 2019 was prepared by Peter H. Souza Jr., LPLS and denotes that portions of the Single-family dwelling (main) and the Ohana dwelling walls are built into the (south) side yard, in lieu of the required 20-foot side yard setback, as required by the Hawai'i County Code, Chapter 25, Zoning, Section 25-5 76, Minimum yards requirements. (See Exhibit A-Site Plan)

The survey map dated January 5, 2019 shows sections of the single-family dwelling (main) with a minimum 18.7 feet (south) side yard setback, in lieu of the required 20-foot side yard setback. The Ohana Dwelling has a minimum 19.6 feet (south) side yard setbacks, in lieu of the required 20-foot side yard setback.

7. **Planning Records:** Ohana Dwelling Permit (OD 89-207) was granted by the Planning Department on July 25, 1987. At that time, the zoning code that was in effect did not have an additional 5 feet setback requirement for Ohana Dwellings.
8. **County Building Records:** Hawai'i County Real Property Tax Office records indicate that a building permit (#915245) was issued on March 6, 1991 for an Ohana dwelling consisting of 1 bedroom, 2.5-bath and garage, and building permit (#915246) was simultaneously issued on March 6, 1991 for a single-family dwelling consisting 2 bedrooms, 2.5 bath. Building permit (#975692) was issued on August 8, 1997 for the conversion of an existing garage into 2 bedrooms and a den; a building permit (#015065) was issued on January 16, 2001 altering the conversion permit (#975692) to include the addition of a bar sink and counter in the hallway. A building permit (#2005-1301K) was issued on August 11, 2005 for the addition of retaining walls up to 12' high on the property. Lastly, a building permit (#B2007-0248K) was issued on February 28, 2007 to expand the living room, master bedroom, add an additional bedroom and add a garage; this permit was requested by the owner to be canceled on January 31, 2019.
9. **Agency Comments and Requirements**
  - a. State Department of Health (DOH) memorandum dated February 8, 2019. "The Health Department found no environmental health concerns with regulatory implications in the submittals."
  - b. No comments were received from Department of Public Works - Building Division as of this date.
10. **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 January 23, 2019 and

February 1, 2019, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on February 6, 2019.

11. **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.
12. **Time Extension:** The applicant's variance application was acknowledged by a letter dated January 11, 2019. No extensions were requested.

### GROUNDNS 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 encroachment of the dwelling walls resulting in a minimum 18.7 feet (south) side yard setback for what is considered the Single-family Dwelling and resulting in a minimum 19.6 feet (south) side yard setback for what is considered the Ohana Dwelling. This is in lieu of the required 20-foot side yard setback, as required by the Hawai'i County Code.

The survey map dated January 5, 2019 shows sections of the single-family dwelling and Ohana dwelling with a minimum 18.7 feet (south) side yard setback for what is considered the Single-family Dwelling and a minimum 19.6 feet (south) side yard setback, in lieu of the required 20-foot side yard setbacks.

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 construction began in 1991, with continual changes to designs and improvements sometime after 1991. The original and subsequent construction permits were issued by the County for the existing single-family dwelling and Ohana dwelling and closed under valid building permit inspections. 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. Furthermore, the Ohana Dwelling Permit was approved on July 25, 1989, which at that time, the zoning code did not have an additional 5 feet setback requirement for Ohana dwellings as currently exists under current zoning code..

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 building encroachments and/or redesign the 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 both the single-family and Ohana dwellings were 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.

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 26 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 and Ohana dwelling built on the subject property ("LOT 57") will not meet the minimum side 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 walls of the main dwelling and/or the Ohana 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 allowable land uses, structure location, and building construction occupancy.
4. Due to the lot creation date being after June 4, 1976, should the use of the Ohana dwelling for home occupation purposes cease for any reason for a continuous period of twelve calendar months, then the use will need to conform to with the provisions identified in HRS 204-4.5. HRS 205-4.5 does not authorize residential dwellings as permitted use in the State Land Use Agricultural district unless the dwelling is related to an agricultural activity or is a farm dwelling.
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.

Mr. Stefan Folkendt Jr.  
February 28, 2019  
Page 6

Should any of the foregoing variance conditions not be complied with, the Planning Director may initiate proceedings to null and void Variance-19-000502.

Sincerely,



MICHAEL YEE  
Planning Director

MK:mk

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

TRUE NORTH  
Scale: 1 in. = 40 ft.

HAMIHA STREET

IKI HOMESTEAD ROAD

LOT 15  
61,356 Sq.Ft.

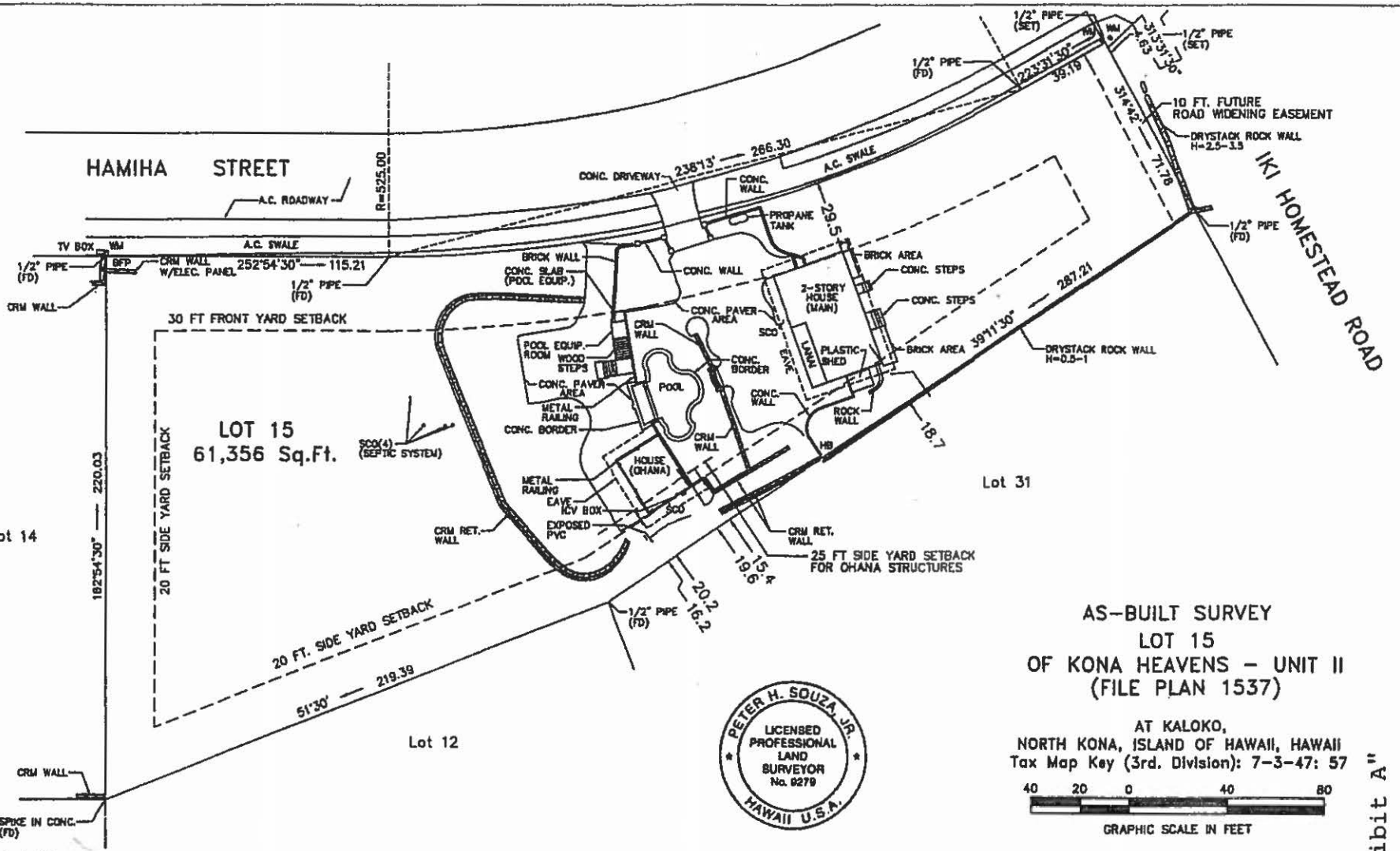
AS-BUILT SURVEY  
LOT 15  
OF KONA HEAVENS - UNIT II  
(FILE PLAN 1537)

AT KALOKO,  
NORTH KONA, ISLAND OF HAWAII, HAWAII  
Tax Map Key (3rd. Division): 7-3-47: 57



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

"Exhibit A"





July 25, 1989

Mr. James B. Dusel  
73-1116 Oluolu Street.  
Kailua-Kona, HI 96740

Dear Mr. Dusel:

Ohana Dwelling Permit (OD 89-207)  
Tax Map Key: 7-3-47:57, Lot 15

The subject application has been reviewed by the concerned agencies and note:

1. The subject tax map key parcel is served by an acceptable street;
2. The subject application can meet with the State Department of Health wastewater treatment and disposal systems requirements;
3. The copy of document(s) received relating to subject tax map key parcel to establish title and exhibits contained therein do not include any deed restriction or covenant to prohibit construction of requested ohana dwelling; and,
4. The submitted site plan denotes two off-street parking stalls on the property.

In view of the above, by this letter, you are hereby granted permission to construct the Ohana Dwelling subject to the following condition(s):

- (a) The building permit for the Ohana Dwelling shall be secured on or before July 25, 1991. If the applicant and/or owner fails to secure a building permit within two (2) years of the date of this letter, permission to construct the subject ohana dwelling shall be deemed void. A time extension may be granted for good cause, provided, the permittee and/or owner applies in writing at least forty-five (45) calendar days before the expiration of the two (2) year period.

"Exhibit B"

JUL 26 1989

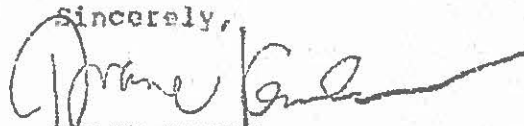


Mr. James H. Dusel  
Page 2  
July 25, 1989

- (b) Off-street parking space for two vehicles is designated on the submitted site plan to fulfill the off-street parking requirement. The off-street parking spaces may not be employed for storage or other use unless and until approved alternative on-site parking arrangements are established.
- (c) All construction drawings together with approved site plan drawn to scale submitted with the ohana dwelling building permit application shall denote location and identify required two (2) off-street parking spaces.
- (d) The ohana dwelling shall conform to all requirements of codes and statutes pertaining to access and building construction.
- (e) The applicant shall conform to State Department of Health standards and regulations and following comment(s) dated June 30, 1989:  
  
"An individual wastewater system may service a maximum of 800 gallons per day of sewage, which is generated from a single or multiple dwelling unit complex, containing a total of only four (4) bedrooms.  
  
The minimum setback requirements for cesspools, as per Administrative Rules 11-62, must be met."  
  
(f) This Ohana Dwelling permit is subject to all other applicable rules, regulations and requirements, including but not limited to those of the Planning Department, Department of Public Works, and State Department of Health.

Please bring or attach a copy of this Permit to expedite processing the building plans and building permit application to construct the ohana dwelling. Should you have any questions regarding the above, please feel free to contact either Masa Onuma or William Yamanoha of my staff at 961-8288.

Sincerely,



DUANE KANUHA  
Planning Director

WRY:etn  
cc: Department of Health,  
Chief Sanitarian  
Department of Public Works  
Real Property Tax Division

"Exhibit B"