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County of Hawai'i
PLANNING DEPARTMENT

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April 22, 2019

Victoria Husen
P.O. Box 1469
Kamuela, HI 96743-1469

Dear Ms. Husen:

SUBJECT: Application: Variance - VAR 19-000503
Applicant: VICTORIA HUSEN
Owners: VICTORIA KRISTINA HUSEN
Request: Variance from Chapter 25, Zoning, Article 5, Division 1, Section 25-5-56, Minimum Yards Requirements and Section 25-4-44(a) Permitted Projections into Yards and Open Spaces (Encroachment into Northwest Rear Yard Setback and Open Space Requirement)
Tax Map Key: 6-5-002:057 Lot 3-A (Revised)

The Planning Director certifies the **denial** of the application for Variance No. 19-000503. The Planning Director, after review of the application, has determined that all grounds for a variance have not been met, and as a result, a decision has been made that does not allow the unpermitted 2-Story Building on Lot 3-A (Revised) to remain with a minimum 11.41-foot and 16.91-foot rear (northwest) yard setback and open space in lieu of the required 25-foot front yard setback and 19-foot open space, which has resulted with this action that the variance request is **denied**.

The minimum yard and open space requirement is 25-foot rear yard setback and 19-foot open space, as required by the Hawai'i County Code, Chapter 25, Zoning, Section 25-5-56, Minimum yards requirements and Section 25-4-44 (a) Permitted Projections into Yards and Open Spaces.

BACKGROUND AND FINDINGS

1. **Location.** The subject property, Lot 3-A (Revised), contains approximately 40,095 square feet and is situated within the "Waimea Homesteads", Waimea, South Kohala, Hawai'i. The subject property's street address is 65-1239 Laelae Road, Waimea, HI 96743.

2. **County Zoning.** Agricultural – one-acre. (A-1a).
3. **State Land Use Designation.** Urban.
4. **Setback Requirements.** 25 feet front/rear yard and 15 feet for side yards.
5. **Variance Application.** The applicant/owner submitted the variance application, attachments, filing fee, and associated materials on January 11, 2019. The variance application’s “as-built” survey map dated November 13, 2018 was prepared by Thomas G. Pattison, LPLS and denotes that portions of the unpermitted 2-story building walls are built into the rear (northwest) yard setback and open space requirement. **(See Exhibit 1-Site Plan)**

The “as-built” survey map dated November 13, 2018 shows sections of the unpermitted 2-story building walls and roof eaves encroaching 13.59-foot and 8.09-foot with a minimum 11.41-foot and 16.91-foot rear (northwest) yard setback and encroaching 7.59-foot and 2.09 into the open space requirement a minimum 19-foot open space requirement.

6. **County Building Records.** Hawai‘i County Real Property Tax (RPT) Office records indicate that building permit (#15754) was issued on October 15, 1954 for a single-family dwelling. In addition, RPT Office records indicate that building permit (#800636) was issued on March 12, 1980 for an addition/repair. Additional building permits were issued on August 10, 1983 (#831288), February 10, 1989 (#895180), and January 21, 2000 (# 005090) for alterations and additions to the dwelling. There are no records of a building permit for a 2-story accessory building as denoted on the “as-built” survey map.
7. **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.
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 February 11, 2019 and March 25, 2019 respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on February 2, 2019.
9. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. Twelve written comments, including seven objections from surrounding property owners or the general public were received.

GROUNDNS FOR DENYING VARIANCE, IN PART, FOR VAR-19-000503

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 does not meet criterion (a). There are no special or unusual circumstance found applying to the subject property which deprives the owner of substantial property rights or which interferes with the best use of the property.

Lot No. 3-A (Revised) comprises 40,095 square feet to provide enough area for structures identified on an “as-built” survey map showing existing conditions” as a 2-Story Building located almost entirely within the rear setback and a “2-Story Building” (dwelling with garage and deck above) and related improvements. Based on an aerial image with a date of August 11, 2014, the subject lot appears to be flat with sufficient area in the rear of the lot for the detached 2-Story Building that measures approximately 15-feet by 23-feet.

Our office responded to a zoning complaint for an unpermitted structure and intrusion into setback, and conducted an inspection on October 10, 2018. A Follow-up letter was sent on October 15, 2018, requesting a survey to verify the location of the unpermitted structure. After review of the survey it was determined that the unpermitted structure was located in the setback, and a variance from zoning application was submitted on December 12, 2018, that was returned for being incomplete. A second variance from zoning application was received by our office on January 11, 2019, and was initially acknowledged on January 24, 2019, then again on February 19, 2019, to provide new deadline dates for the planning director to render a decision and to extend the public comment period. There are no Planning Department approvals to allow the unpermitted 2-Story Building as a second dwelling on the subject parcel and there was no building permit obtained for the detached accessory structure.

The special and unusual circumstances provided by the applicant that are included in the variance application, is that the owner relied on the builder in determining the location and setbacks for the structure, a 384 square foot “outbuilding”. The owner also stated that the location of the “outbuilding” was limited by a number of limiting factors, such as; steep sloping topography; having close proximity to driveway to the “outbuilding”; presence of power lines and utilities in the northeast quadrant of parcel; presence of a large native tree; and boundary markers moved by others. None of the above circumstances stated by the applicant are special or unusual circumstance that apply to the subject property that exists to degree that, if the “outbuilding” was not allowed in its current position, would deprive the owner of substantial property rights that could be available if the “outbuilding” were placed elsewhere on the property.

Alternatives

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

The Variance application does not meet criterion (b) for the “as-built” 2-Story Building for the following reasons:

The “as-built” survey map denotes a 2-Story Building that was built as post and pier construction almost entirely within the rear (northwest) yard setback without first obtaining a building permit for a detached accessory building or guest house. The alternative is to: (1) remove the building encroachments from the rear yard to fit within the correct building envelope; and (2) obtain a building permit for a detached accessory building, bedroom, or a guest house, dependent on approvals from the State Department of Hawaii, Department of Health, for the addition of bedrooms, if requested, on Lot No. 3-A (Revised). Considering the small (384 square foot) size of the “outbuilding,” and its post and pier construction, the removing, or moving of the “outbuilding” is a reasonable alternative that would resolve the difficulty.

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 does meet criterion (c) for the “as-built” 2-Story Building for the following reasons:

The current encroachment of the unpermitted 2-Story Building is consistent with the intent and purpose of this chapter, and the general plan, in that it still provides for air, light and circulation, in that the encroachment leaves a minimum 11.41-foot and 16.91-foot rear (northwest) yard setback, in lieu of the required 25-foot front yard setback and 19-foot open space.

PLANNING DIRECTOR’S DECISION FOR DENIAL

Based on the variance application’s “as-built” survey map, the unpermitted 2-Story Building built on the subject property (“LOT No. 3-A (Revised)”) will not meet the minimum rear yard and open requirements pursuant to Hawai‘i County Code, Chapter 25, (Zoning Code).

The Planning Director certifies the **denial** of the application for Variance No. 19-000503. The Planning Director, after review of the application, has determined that all grounds for a variance have not been met, and as a result, a decision has been made that does not allow the unpermitted 2-Story Building on Lot 3-A (Revised) to remain with a minimum 11.41-foot and 16.91-foot rear (northwest) yard setback and open space in lieu of the required 25-foot front yard setback and 19-foot open space, which has resulted with this action that the variance request is **denied**.

CONDITIONS

1. The applicant/owner(s), their assigns or successors shall be responsible for complying with all land use laws and zoning codes of the State of Hawaii and the County of Hawaii.
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 for any actions taken to bring the structures on the subject parcel into compliance with the zoning code of the County of Hawaii.
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. The applicant/owner(s), successors or assigns shall relocate or remove the structure identified as the 2-Story Building located within the rear (northwest) setback and open space on the "as-built survey map (Exhibit "1")" to fit within the correct building envelope as prescribed by the Zoning Code for the subject parcel within one year from the date of this letter.
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.
6. Building permits shall be obtained for structures identified on Exhibit "1" as a 2-Story Building located within the rear (northwest) setback and open space on Lot No. 3-A (Revised), and any other existing structures requiring a building permit, and move the 2-Story Building" out of the minimum rear yard setback and open space requirement.

Should any of the conditions not be complied with, the Planning Director may initiate enforcement procedures which may result in a Notice of Violation and the assessment of daily fines.

Sincerely,



MICHAEL YEE
Planning Director

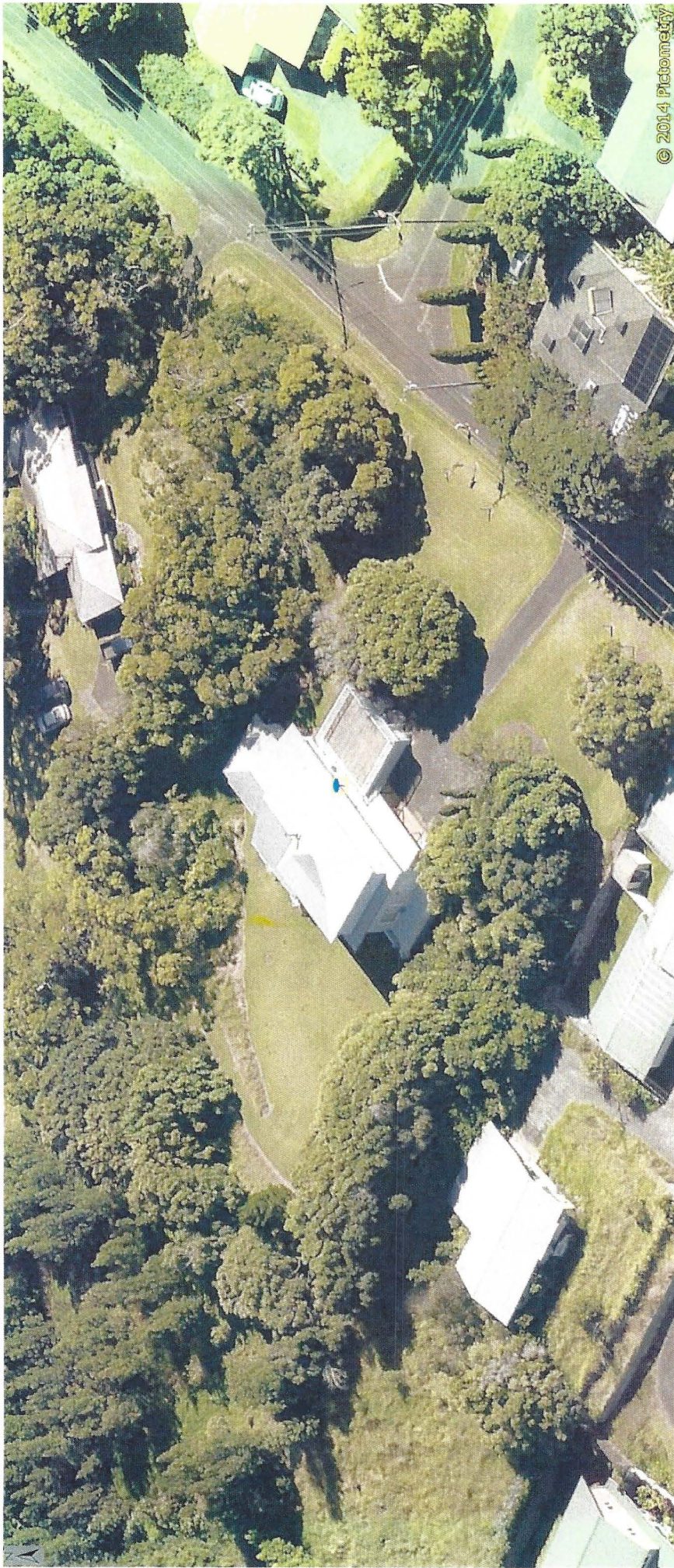
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xc : DPW Building Division
Ms. Natalie Whitworth, DPW Engineering Division
Real Property Tax Office (Kona)
Mr. Gilbert Bailado, GIS

65002057

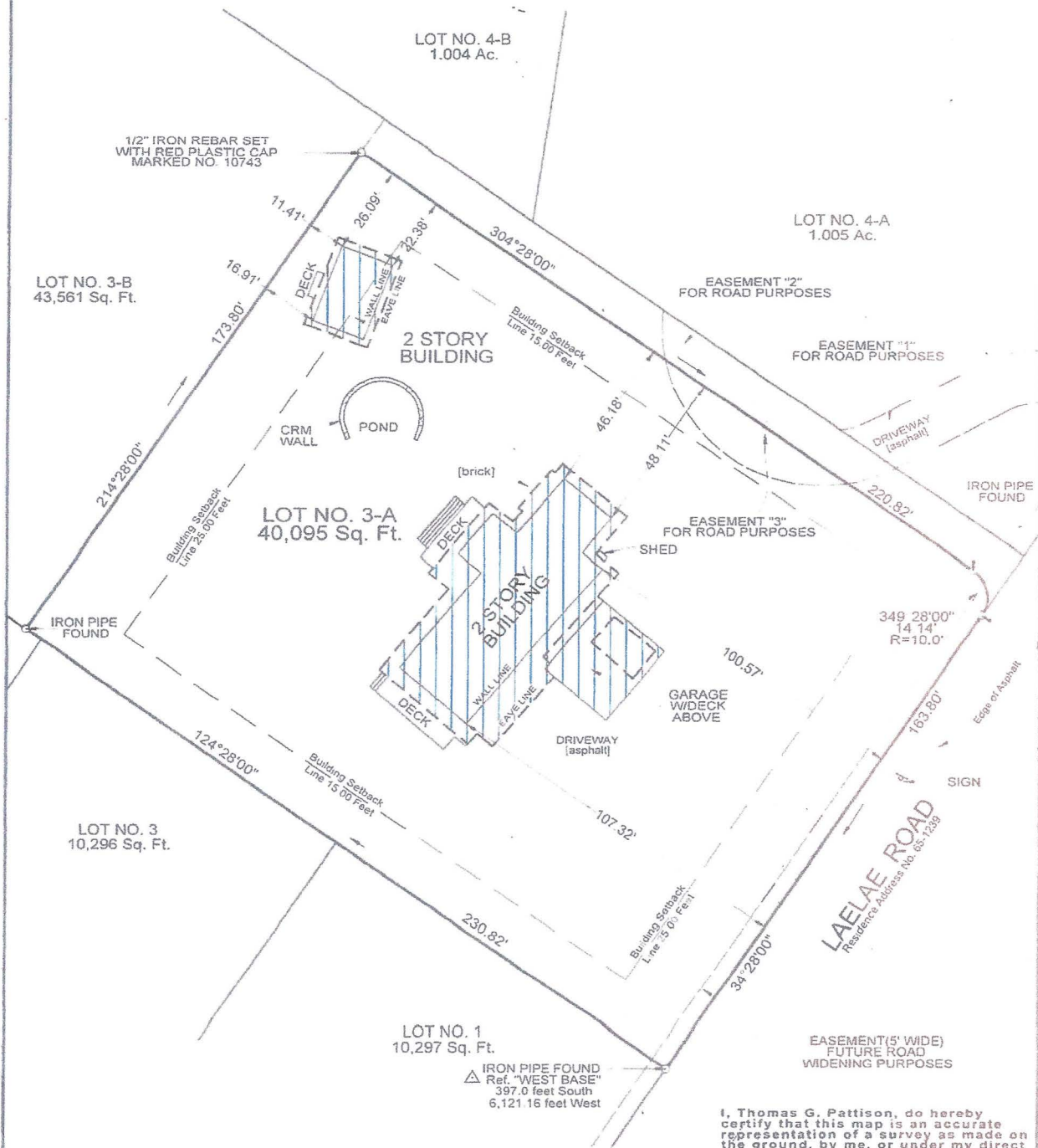
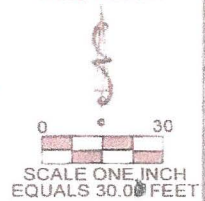


08/11/2014

AS-BUILT MAP SHOWING EXISTING
CONDITIONS UPON
LOT 3-A

Being a Portion of Land Patent Grant 12,800 to Hans L'Orange at Waimea,
Also Being a Portion of Lot 3, in Block 10
of "WAIMEA HOMESTEADS"
South Kohala, County of Hawaii, State of Hawaii
TMK: (3)-6-5-002:057

TRUE NORTH



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.

NOTE: BASIS OF AZIMUTH DERIVED USING HEMISPHERE GPS RTK SYSTEM

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

EXHIBIT 1



THOMAS G. PATTISON
November 13th, 2018--Job 18433
Hawaii License No. 10743

Setback Lines are shown from current data, but should be verified by builder. 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 dimension is to be assumed by scaling.