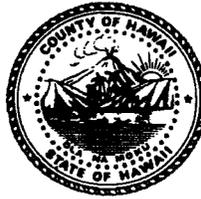


Harry Kim  
Mayor

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

Michael Yee  
Director

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November 20, 2019

William McCowatt  
Hale Hawai'i Design  
P.O. Box 6106  
Kamuela, HI 96743

Dear Mr. McCowatt:

**SUBJECT: Application: Variance – VAR-19-000551**  
**Applicant: WILLIAM MCCOWATT**  
**Owner: EVERELL AND CHERYL THAYER**  
**Variance from Chapter 25, Zoning, Article 5, Division 1,**  
**Section 25-5-96, Minimum Yards, and Section 25-4-44,**  
**Permitted Projections into Yards and Open Space Requirements**  
**(Encroachment into Front (West) Yard Setback.**  
**Tax Map Key: (3) 2-6-001:013 (Lot 11)**

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The Planning Director certifies the **approval** of Variance No. 19-000551, subject to variance conditions. The variance will allow a portion of the single-family dwelling (House #1) to remain with a minimum 17.60 feet front (west) yard setback and associated roof eave projection resulting with a 11.47 feet front (west) yard open space in lieu of the required 20-foot front yard setback and required 14-foot open space requirement. It also allows for the single-family dwelling (House 1) to remain with a minimum 9.72 feet side (north) yard setback and associated roof eave resulting with a 4.96 feet in lieu of the required 10-foot side yard setback and required 5-foot side yard open space requirement. These exceptions are in lieu of the required 20-foot front yard and 14-foot front yard open space requirement and the 10-foot side yard setback and 5-foot side yard open space requirement 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.

The original single-family dwelling (House 3) was built in 1964, prior to the adoption of the Zoning Code in 1967. Therefore, the encroachment of the single-family dwelling into the side yard setback as reflected on the site plan is considered legal non-conforming.

## BACKGROUND AND FINDINGS

1. **Location.** The subject property contains approximately 29,080 sq. ft. and is situated in the Pu'u'eo Lots, Pu'u'eo, South Hilo, Hawai'i. The subject property's street address is 56 Pukihae Street.
2. **County Zoning.** Resort-Hotel– 750 sq. ft. (V - .75)
3. **State Land Use Designation.** Urban.
4. **Setback Requirements.** Front and rear yards, twenty feet; Side yards, eight feet for one story, and an additional two feet for each additional story.
5. **Variance Application.** The applicant/owner submitted the variance application, attachments, filing fee, and associated materials on July 22, 2019. The variance application survey map dated November 13, 2017, was prepared by Niels Christensen, LPLS, The Hawai'i Independent Surveyors, LLC. (See **Exhibit A-Site Plan**)

The site plan shows that a portion of the single-family dwelling (House 1) encroaches 2.2 feet into the 20-foot front yard setback and it also shows that the single-family dwelling (House 1) encroaches 2.53 feet into the front yard open space requirement. It also denotes that the single-family dwelling encroaches 0.28 feet (3.36 inches) and 0.04 feet (0.48 inches) into the side yard open space requirement.

The encroachments leave a minimum 17.80 feet front (west) yard setback, in lieu of the required 20-foot front yard setback and a 11.47-foot associated front (west) yard open space in lieu of the required 14-foot front open space requirement and it also leaves a minimum 9.72- foot side (north) yard setback and a 4.96-foot side (north) yard open space.

6. **County Building Records.** Hawai'i County Real Property Tax office records indicate the following building permits:
  - a. Building Permit - 866 was issued for the construction of a single-family dwelling consisting of: 3 bedroom, 1-1/2 bath, living room, kitchen, and dining area on December 1946.
  - b. Building Permit – 039187 was issued for the construction of a single-family dwelling consisting of: 1 bedroom, 1 bath, living room, kitchen, and dining area on December 7, 1947.
  - c. Building Permit – BH2019-00927 was issued for the complete demolition of House #2, shared cesspool to be abandoned. (Permit still open)

**7. Agency Comments and Requirements.**

- a. No comments received from State Department of Health (DOH)
- b. The Department of Public Works Building Division (DPW) memorandum dated October 22, 2019 states: House 2 has projections within the setback without fire protection. Hawai'i County Code prohibits projections more than 12" into the required 5' setback without fire protections (up to a maximum of 2' from the property line).

Note that House 1 and House 3 have projections that are not greater than the 12" required (4.96' & 4.02' respectively).

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 15, 2017, and May 29, 2019, respectively. Notice of this application was published in the Hawai'i Tribune Herald and West Hawai'i Today on October 11, 2019.
9. **Comments from Surrounding Property Owners or Public.** No written comments or objections from surrounding property owners or the general public were received.

**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 encroachment of the single-family dwelling (House #1 into the 20-foot west front yard setback and into the 10-foot north side yard setback as required by the Zoning Code.

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 constructed in 1968, nearly 51 years ago, and subsequent construction permits were issued and closed under valid building permit by the County for the existing structure. 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 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:

To remove the building encroachments and/or redesign the existing single-family dwelling denoted on the survey map to fit within the correct building envelope as prescribed by the Zoning Code would be deemed unreasonable, especially when the owners complied with the building permit process and were under the impression that the enclosed single-family dwelling House #1) was in compliance with all County requirements.

Because the encroachments are within the side yard setback, one alternative would be to consolidate the front yard of the subject property with the roadway and consolidate the subject property with the adjoining side property, which is owned by someone else, and resubdivide the property to modify property lines and adjust minimum front and side yard setbacks.

Both of these alternatives are not practical. 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 single-family dwelling has been in existence for approximately 51 years and was constructed under valid building permits and other construction permits issued by the County of Hawai'i. Subsequent building additions were also constructed under valid building permits and other construction building permits. 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's survey map, the shed, covered patio, carport, workshop and office built on the subject property (Lot 16-B) will not meet the minimum rear and side yard setback requirements 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 existing single-family dwellings (House 1 & 3) on the subject property be destroyed by fire or other natural causes, the replacement structures 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 single-family dwelling (House #2) shall be completely removed or relocated out of the setback with six months from the variance (VAR-19-000551) approval date.
5. Future or new building improvements and permitted uses shall be subject to State laws and County Ordinances and Regulations pertaining to building construction and building occupancy.

William McCowatt  
Hale Hawai'i Design  
November 20, 2019  
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Should any of the foregoing variance conditions not be complied with, the Planning Director may initiate proceedings to null and void Variance No. 19-000551.

Sincerely,



MICHAEL YEE  
Planning Director

LHN:jaa

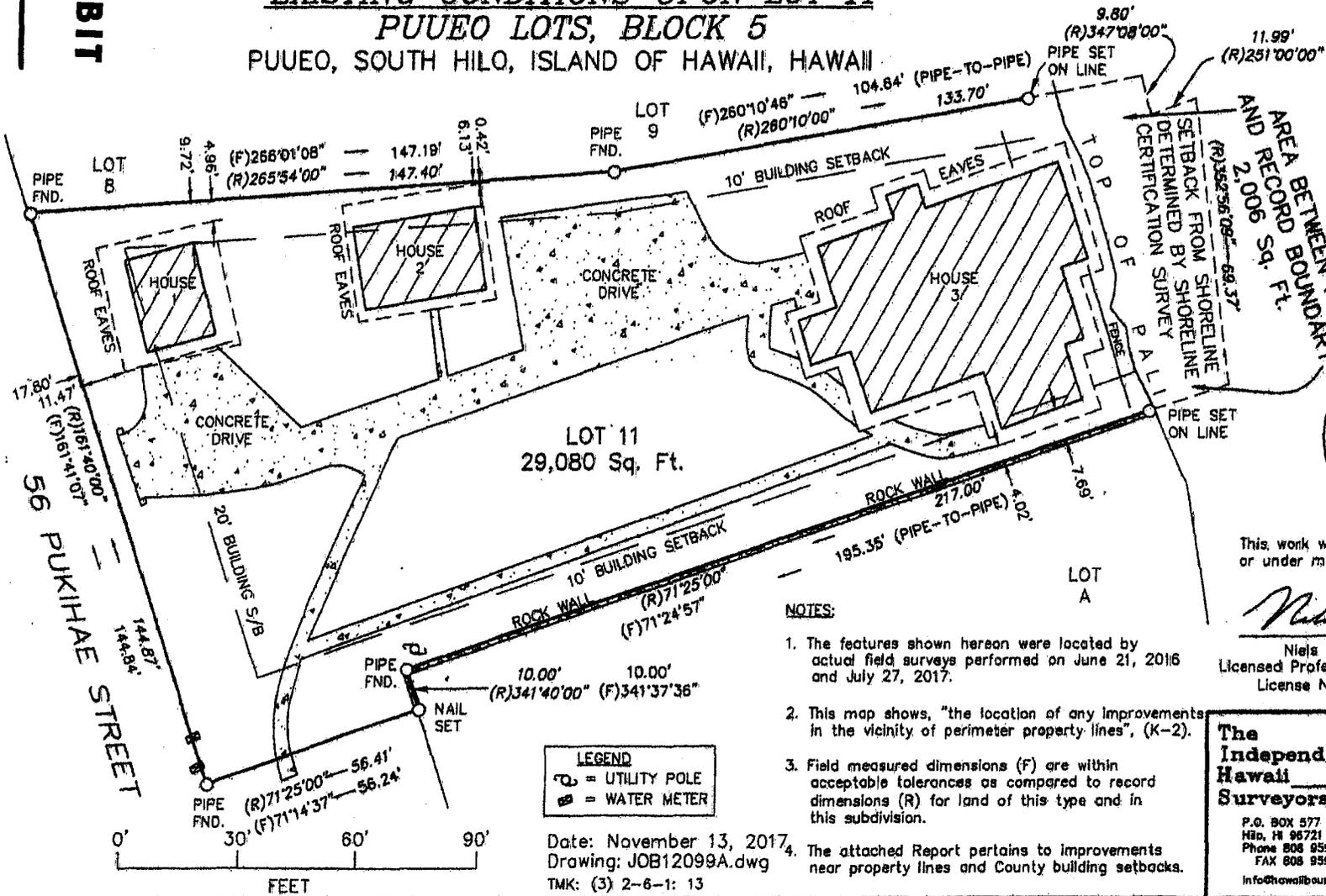
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Enclosure: Exhibit A- Site Plan

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

**EXHIBIT**

**EXISTING CONDITIONS UPON LOT 11**  
**PUUEO LOTS, BLOCK 5**  
 PUUEO, SOUTH HILO, ISLAND OF HAWAII



HILO BAY

TRUE NORTH  
 SCALE: 1 IN. = 30 FT.



This work was prepared by me or under my direct supervision.

*Niels Christensen*

Niels Christensen  
 Licensed Professional Land Surveyor  
 License Number 9077

**NOTES:**

1. The features shown hereon were located by actual field surveys performed on June 21, 2016 and July 27, 2017.
2. This map shows, "the location of any improvements in the vicinity of perimeter property lines", (K-2).
3. Field measured dimensions (F) are within acceptable tolerances as compared to record dimensions (R) for land of this type and in this subdivision.
4. The attached Report pertains to improvements near property lines and County building setbacks.

**LEGEND**

	= UTILITY POLE
	= WATER METER

Date: November 13, 2017  
 Drawing: JOB12099A.dwg  
 TMK: (3) 2-6-1: 13

**The Independent Hawaii Surveyors, LLC**

P.O. BOX 577  
 Hilo, HI 96721  
 Phone 808 959-0360  
 FAX 808 959-0353  
 info@hawaiiboundary.com

19°35.898'N, 154°56.433'W COUNTY GIS