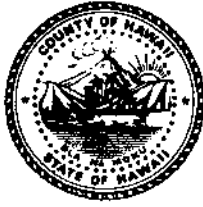


Harry Kim  
Mayor

Roy Takemoto  
Managing Director

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



## County of Hawai'i PLANNING DEPARTMENT

Michael Yee  
Director

April Surprenant  
Acting Deputy Director

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

July 15, 2020

Daniel Berg  
dlb & associates, LLC  
P.O. Box 492281  
Kea'au, Hawai'i 96749

Dear Mr. Berg:

**SUBJECT: Application: Variance - VAR 20-000561**  
**Applicant: DANIEL BERG, DLB & ASSOCIATES, LLC**  
**Owner: ERIC DANIEL MCFEE & KRISTEN ANN MCFEE**  
**Request: Variance from Chapter 25, Zoning, Article 5 Division 1**  
**Section 25-5-7 Minimum Yards, Article 4, Division 4,**  
**Section 25-4-44(a) Permitted Projections into Yards and**  
**Open Space Requirements (Encroachment into Northwest**  
**Rear Yard Setback and Southwest Side Yard Setback)**  
**Tax Map Key: (3) 9-9-005:017 (Lot 30)**

The Planning Director certifies the **approval** of Variance-20-000561 subject to conditions. The variance will allow a portion of the single-family dwelling to remain with a minimum 8.8-foot side (southwest) yard setback to a minimum 9.1-foot in lieu of the required 10-foot side yard setback. It also allows for the detached water tank to remain with a 17-foot rear (northwest) yard setback. These exceptions are in lieu of the required minimum 20-foot rear yard setback and 10-foot side yard setback. This variance is from the subject property's minimum front and rear yard setback pursuant to the Hawai'i County Code, Chapter 25, (Zoning), Article 5, Division 1, Section 25-5-7, Minimum yards and Article 4, Division 4, Section 25-4-44(a), Permitted Projections into Yards and Open Space requirements.

### **BACKGROUND AND FINDINGS**

1. **Location.** The subject property consists of approximately 11,200 square feet and is located in the Volcano Golf and Country Club Subdivision, situated at Keauhou, Ka'ū, Hawai'i. The subject property's street address is 99-1769 Pa'iniu Loop.
2. **County Zoning.** Single-Family Residential 15,000 square feet (RS-15).

3. **State Land Use Designation.** Urban.
4. **Required Setback.** Front and rear – 20 feet; sides – 10 feet.
5. **Variance Application.** The applicant/owner submitted the variance application, attachments, filing fee, and associated materials on December 2, 2019. The variance survey map dated May 27, 2019, is drawn to scale, prepared by Daniel Berg L.P.L.S. (dlb & Associates), and denotes the position of the single-family dwelling constructed into the minimum 10-foot side (southwest) yard setback and the detached water tank into the minimum 20-foot rear (northwest) yard setback. **(See revised survey map – Exhibit A)**

The survey map shows that a portion of the single-family dwelling encroaches 0.90 feet (10.9 inches) to 1.2 feet into the 10-foot side (southwest) yard setback and the detached water tank encroaches 3 feet into the rear (northwest) yard setback.

The encroachment leaves the single-family dwelling with a minimum 8.8-foot to a minimum 9.1-foot side (southwest) yard setback in lieu of the 10-foot side yard setback and the detached water tank with a 17.0 rear (northwest) rear yard setback, in lieu of the required 20-foot rear yard setback.

6. **County Building Records.** Hawai'i County Real Property Tax Office records indicate that a building permit (BP 2004-1832H) was issued on September 10, 2004, and finalized on October 5, 2005, for the construction of a two-story single-family dwelling consisting of 2 bedrooms, 2 baths, living room, kitchen, dining area, garage and water tank.
7. **Agency Comments and Requirements**
  - a. State Department of Health (DOH) memorandum dated March 2, 2020: "The Health Department found no environmental health concerns with regulatory implications in the submittals."
  - b. No comments were 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 mailed on September 7, 2019, and January 27, 2020, respectively. Notice of this application was published in the Hawai'i Tribune Herald and West Hawai'i Today on January 13, 2020.

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

- a. Objection letter received from Victoria Kai received on August 23, 2019.  
(See Exhibit B)

10. **Time Extension.** The applicant's variance application was acknowledged by letter dated January 15, 2020, and additional time to review the application was required. The applicant granted the Planning Director an extension of time to July 15, 2020, 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 single-family dwelling into the 10-foot side yard setback and the detached water tank into the 20-foot rear 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 two-story, single-family dwelling constructed in 2005, approximately 15 years ago, and subsequent construction permits were issued and closed under valid building permit by the County for the existing two-story, single-family dwelling and detached water tank. 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 owner was not at fault in creating the encroachment violation and requiring them to fix the encroachments would not be practicable when the owners complied and secured all necessary building permits from the County. Further, there is a park area which aligns with the north rear yard boundary that provides a buffer between the subject property and other properties. Thereby, added costs to relocate the water tank outside of the setback would not increase the separation that the park area already provides. These special and unusual

physical land features would minimize impact of the water tank to the adjacent property owner.

***(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 single-family dwelling and detached water tank encroachments constructed into the affected front and rear yard setbacks of the subject property include the following actions:

Remove the building encroachments and/or redesign the single-family dwelling and detached water tank denoted on the revised survey map to fit within the correct building envelope as prescribed by the Zoning Code. This alternative would be deemed unreasonable, especially when the previous owners complied with the building permit process and were under the impression that the single-family dwelling was in compliance with all County requirements. Any structural or design correction of the single-family dwelling to meet setback requirements would leave unattractive reconstruction scars.

Because the encroachment is within the rear yard setback, to consolidate the subject property with the abutting rear property, which is a park site and subdivide the property to modify property lines and adjust minimum rear yard setbacks are not viable options. Therefore, both alternatives are not practical.

***(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.

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 two-story single-family dwelling has been in existence for approximately 15 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.

Therefore, the variance would be consistent with the general purpose of the zoning district to the area's character or to adjoining properties.

Objections to the variance was received from Victoria Kai; she cites that the approval of the variance may become an issue or a disincentive to potential buyers. Ms. Kai has since sold the property. (See Exhibit C)

### **PLANNING DIRECTOR'S DECISION AND VARIANCE CONDITIONS**

Based on the variance application's survey map, the single-family dwelling and detached water tank built on the subject property ("LOT 30") will not meet the minimum rear and 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 single-family 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 building construction occupancy.
4. 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.
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.

Daniel Berg  
dlb & associates, LLC  
July 15, 2020  
Page 6

Should any of the foregoing variance conditions not be complied with, the Planning Director may proceed to declare subject Variance-20-000561 null and void.

Sincerely,



MICHAEL YEE  
Planning Director

LHN:jaa

P:\Admin Permits Division\Variances From CoH02\Zone9\VAR-20-000561 TMK 990050170000 McFee.doc

Encl: Exhibit A - Survey Map  
Exhibit B - Objection Letter  
Exhibit C - Warranty Deed

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

2020 JAN 30 pm 2:23  
PLANNING DEPARTMENT  
COUNTY OF HAWAII

January 30, 2020

Victoria Kai  
615 Malae Place  
Hilo Hi 96720

Michael Yee  
Hawaii County Planning Director  
101 Pauahi St., Suite 3  
Hilo Hi 96720

Aloha Mr. Yee,

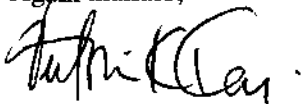
This is in regards to a "Notice of Proposed Action Concerning Variance Application" that I received from our neighbor in the Volcano Golf and Country Club Sub., (tmk 9-9-005-017), located at 99-1769 Painui Loop. I included the notice for you and site plan map.

The county setback requirements have been in place since 1967, fulfilling the need for safe and healthy communities with the responsibility of taking care of our land and limited resources. And *auwē*, people continue to build, sell and buy property that are in zoning violations. I realize the burden for Eric and Kristen McFee who purchased the property last year. Relocating the McFee's home or realigning the affecting wall is not a reasonable solution at this point.

Currently, as the sole landowner of the neighboring vacant undeveloped lot (tmk 9-9-005-018), I am in the process of selling. My concern is that this may become an issue or a disincentive to potential buyers. I would like to propose two things as a condition of the variance. First, that the homeowner's, McFee, create a landscape barrier, higher and wider than the home to be a buffer and to mitigate the intrusion. And secondly, that they trim up to the property line, any vegetation and vegetation overhangs.

I pray that this is a workable solution and I thank you for your consideration and decision.

Again mahalo,

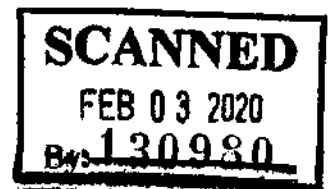


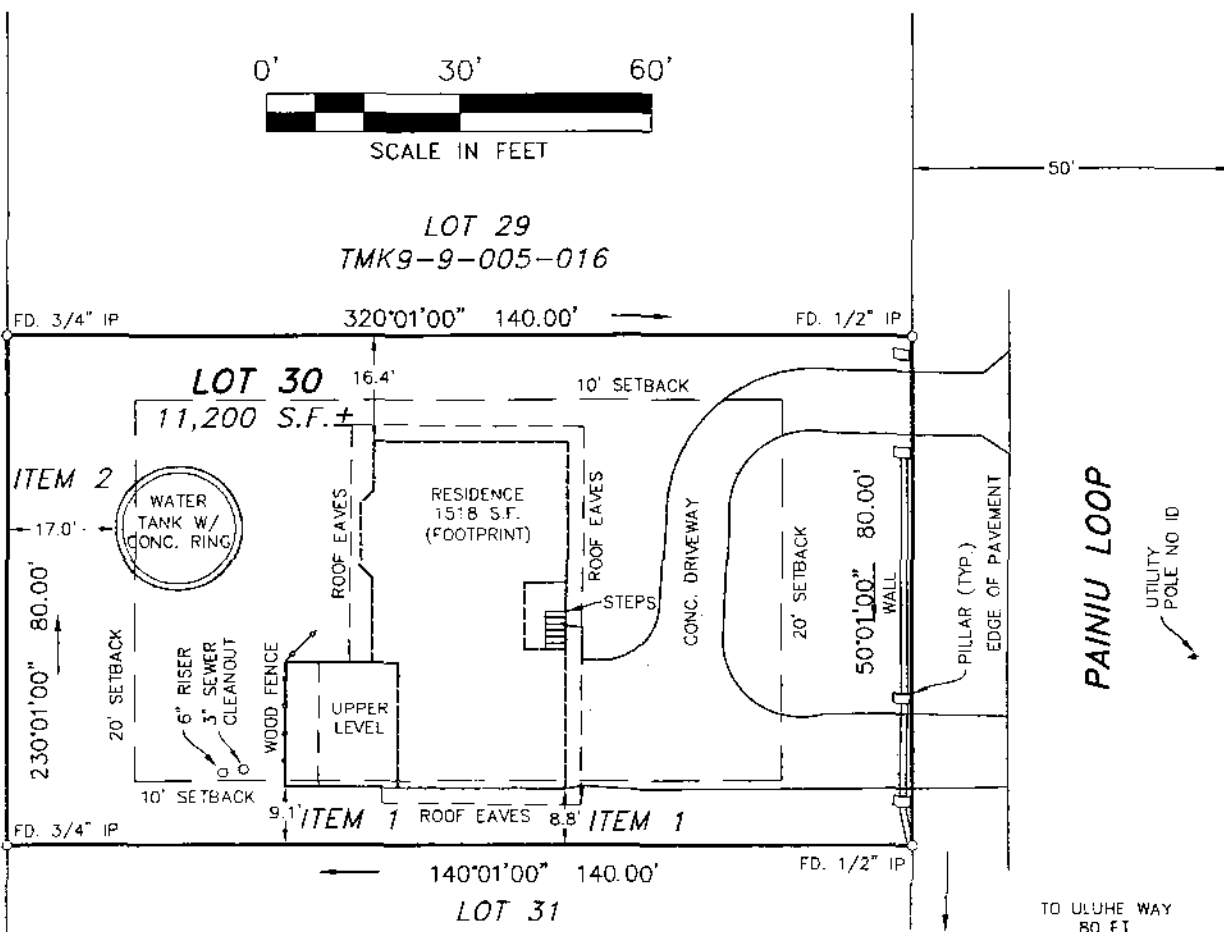
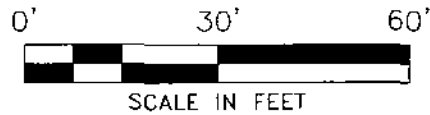
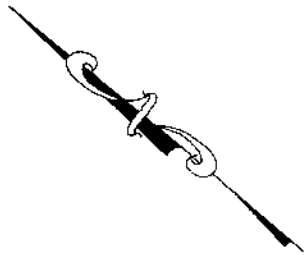
Victoria Kai

cc: Daniel Berg

**EXHIBIT**

B





PARK "B"  
TMK9-9-005-019

**EXHIBIT**  
A

Owners.  
Eric Daniel McFee,  
Kristen Ann McFee  
PO Box 5327  
Volcano, HI. 96720

Situs  
99-1769 Painiu Loop  
Volcano, HI.  
TMK(3) 9-9-005-017

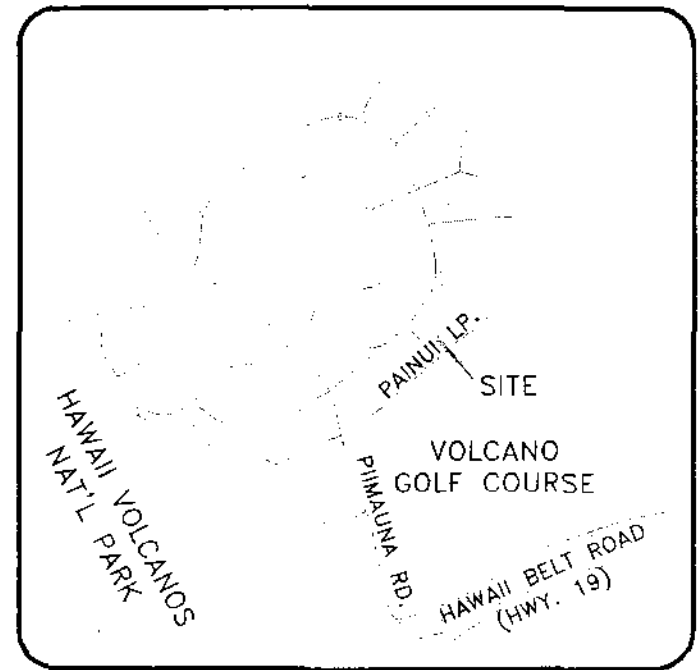
Legal Desc.  
Lot 30 of Volcano Golf & Country Club, Unit 1,  
filed as DAGS File Plan 1036.

Land Use Designation  
Zone RS-15.

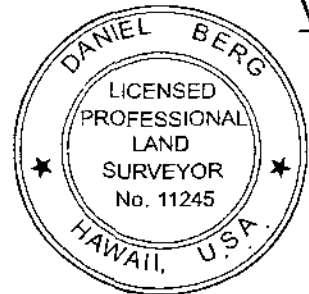
Date: May 27, 2019  
Var. Appl.

Project: J2019-106  
8X14L

**Site Plan**  
Of Lot 30,  
Volcano Golf & Country Club, Unit 1  
Keauhou, Kau, Island and County of Hawaii.  
TMK(3) 9-9-005:017



**Vicinity Map**  
N..T.S.



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

*D. L. Berg*  
Daniel L. Berg  
PLS 11245



**dlb & Associates**  
LAND SURVEYING • MAPPING • CONSULTING

P.O. Box 49-2281 Keauau, HI. 96749  
Ph. 966-4206 Fx. 82-6830  
www.dlbandassoc.com



STATE OF HAWAII  
BUREAU OF CONVEYANCES  
RECORDED March 27, 2020 8:01 AM  
Doc No A73910110  
CONVEYANCE TAX: \$46.00

/s/ LESLIE T. KOBATA, Registrar  
SKC 5

**EXHIBIT**

C

After Recordation, Return by Mail ( ) Pickup ( ) to:

**TG202008615A RS**

Palmer Cosgrove, LLC  
47-018C Hui Iwa Place  
Kaneohe, Hawaii 96744

TG: 2020-08615  
TGE: 23220143721  
Ms. Tracy Yamaguchi  
Total pages: FIVE

Affects: Tax Key: (3) 9-9-005-018  
Lot 31, Volcano Golf & Country Club, Unit I, File Plan 1036  
Document No. 2001-022537 & Document No. 2001-060286

WARRANTY DEED

THIS WARRANTY DEED, is made this 23<sup>rd</sup> day of March, 2020, by:

VICTORIA K. KAI, wife of Alan Walker, whose address is 615 Malae Place, Hilo, Hawaii 96720 (hereinafter referred to as "GRANTOR"), in favor of

PALMER COSGROVE, LLC, a Hawaii Limited Liability Company, its address is 47-018C Hui Iwa Place, Kaneohe, Hawaii 96744 (hereinafter referred to as "GRANTEE");