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July 17, 2020

Daniel Berg, LPLS
P.O. Box 492281
Kea'au, Hawai'i 96749

Dear Mr. Berg:

SUBJECT: Application: Variance - VAR 20-000562
Applicant: DANIEL BERG (DLB & ASSOCIATES, LLC)
Owner: KATHLEEN MOULTON & DAWN SMITH
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 South
Side Yard Setback)
Tax Map Key: (3) 1-3-036:054 (Lot 35)

The Planning Director certifies the **approval** of Variance-20-000562 subject to conditions. The variance will allow a portion of the single-family dwelling to remain with a minimum 11.6-foot side (south) yard setback in lieu of the required 20-foot side yard setback and a 7.5-foot side (south) yard open space in lieu of the required 14-foot side yard open space. These exceptions are in lieu of the required minimum 20-foot side yard setback and 14-foot side yard open space. This variance is from the subject property's minimum rear yard setback pursuant to the Hawai'i County Code, Chapter 25, (Zoning), Article 5, Division 7, Section 25-5-76, 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 contains approximately one acre (43,560 sq. ft.) and is in the Leilani Estates Subdivision, situated at Keahialaka, Puna, Hawai'i. The subject property's street address is 13-3433 Moku Street.
2. **County Zoning.** Agriculture – 1 acre (A-1a).
3. **State Land Use Designation.** Agricultural.

4. **Required Setback.** 30 feet for 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 2, 2019. The variance survey map dated August 8, 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 20-foot side (southwest) yard. (See revised survey map – Exhibit A)

The survey map shows the following setbacks:

- a. The encroachment leaves portion of the single-family dwelling with a minimum 11.6-foot side (south) yard setback in lieu of the required 20-foot side yard setback and a minimum 7.5-foot side (south) yard open space in lieu of the required 14-foot side yard open space.

The survey map shows the following encroachment:

- a. Portion of the single-family dwelling encroaches 8.4 feet into the 20-foot side (south) yard setback and 6.5 feet into the 14-foot side (south) yard open space.

6. **County Building Records.** Hawai'i County Real Property Tax office records indicate that the the following building permit was issued.
 - a. Building Permit 031587* issued on August 4, 2003, for the construction of a single-family dwelling consisting of 3 bedrooms, 2 baths, living room, kitchen carport with enclosed utility room and galvanized steel water tank. Permit finalized on February 9, 2005.
7. **Agency Comments and Requirements.**
 - a. State Department of Health (DOH) memorandum dated January 27, 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 December 05, 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.** No further written agency comments were received. No written comments or objections from surrounding property owners or the public were received.
10. **Time Extension.** The applicant's variance application was received on December 02, 2019; additional time to review the application was required. The applicant granted the Planning Director an extension of time to issue a decision on the Variance Application until July 19, 2020.

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 20-foot (south) side yard setback and 14-foot side (south) yard open space.

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 single-family dwelling authorized under building permit 031587*, was issued on August 4, 2003, and given final inspection approval on February 9, 2005. It appears that building permit inspections of the premises by the affected agencies during construction of the single-family dwelling improvements did not disclose any building encroachment issues or building setback irregularities at that time.

Based on the above-mentioned information, special and unusual circumstances do exist to an extent that they deprive the owner of substantial property rights that would otherwise be available, or which unreasonably interfere with the best use or manner of development of the subject property.

- (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 encroachment constructed into the affected side yard setback of the subject property include the following actions:

Relocate the single-family dwelling denoted on the site plan 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 the single-family dwelling followed all County requirements

Because the encroachment is within the side yard setback, to consolidate the subject property with the adjacent side yard property, which is owned by someone else, and re-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.

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 single-family dwelling built upon the subject property ("LOT 35") will not meet the minimum side yard requirements pursuant to Hawai'i County Code, Chapter 25, (Zoning Code).

Daniel Berg
dlb & associates, LLC
July 17, 2020
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This variance application is approved subject to the following variance conditions:

1. The applicant/owner(s), 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/owner(s), 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. 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-20-000562 null and void.

Sincerely,



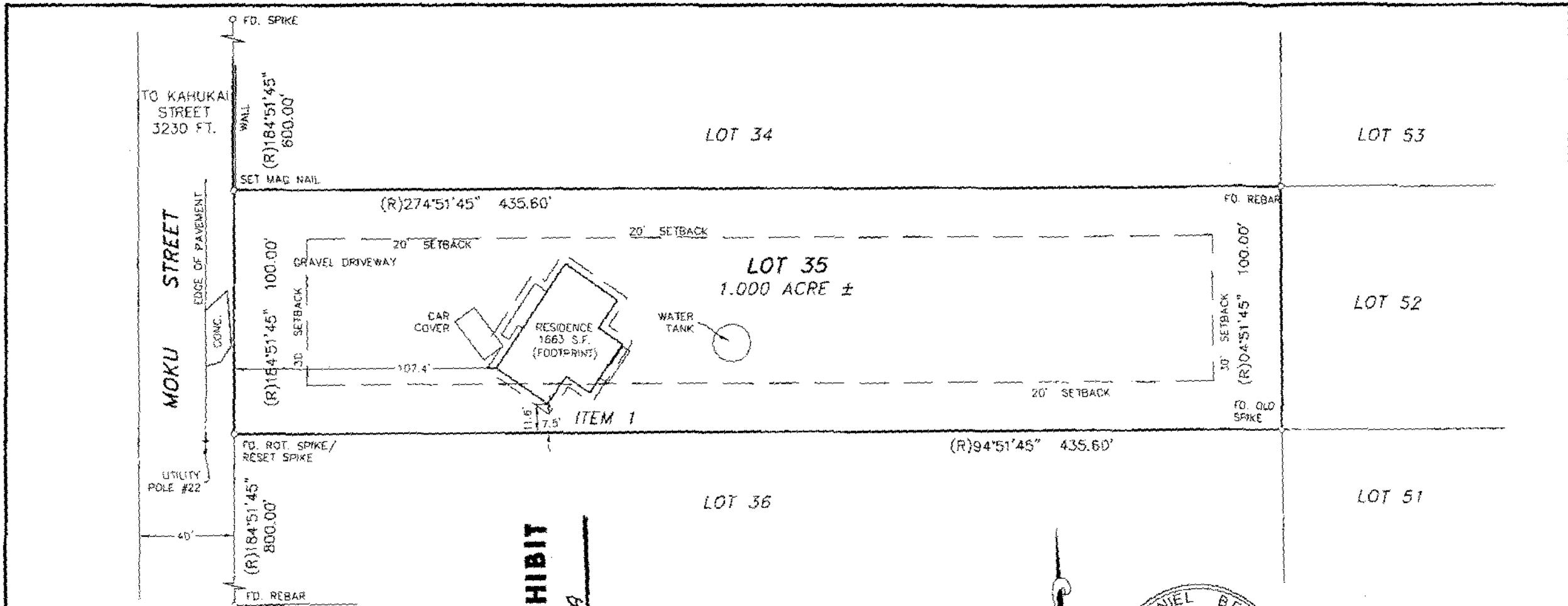
MICHAEL YEE
Planning Director

LHN:jaa

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Enclosures: Exhibit A-Site Plan

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



TO KAHUKAI STREET
3230 FT.

MOKU STREET

LEILANI AVENUE

LOT 34

LOT 53

LOT 36

LOT 51

LOT 35
1.000 ACRE ±

LOT 52

EXHIBIT
A

Owners:
Kathleen Marie Moulton, Tr.

Situs:
13-3433 Maku St., Pahoa, HI. 96778
Tax Map Key (3) 1-3-036-054

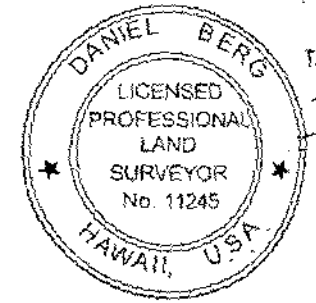
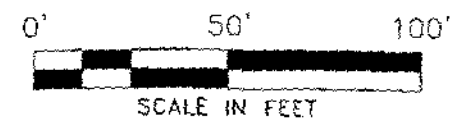
Survey:
Field survey completed August 8, 2019.
Boundary courses are record dimensions per Leilani Estates Subdivision, Filed as DAGS File Plan No. 672.

This Map was prepared for a variance application, and should not be used for any other purpose.

Date: August 8, 2019

Project: J2019-205
BX14L

Site Plan
Of Lot 35, Block 21,
Leilani Estates Subdivision,
Keahialaka, Puna,
Island and County of Hawaii.



This work was prepared by me or under my direct supervision.
Daniel L. Berg
Daniel L. Berg
PLS 11245

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