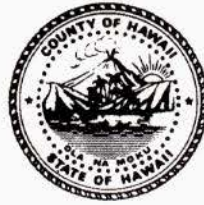


Harry Kim  
Mayor

Roy Takemoto  
Managing Director

West Hawai'i Office  
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## County of Hawai'i PLANNING DEPARTMENT

Michael Yee  
Director

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Acting Deputy Director

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101 Pauahi Street, Suite 3  
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Phone (808) 961-8288  
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June 19, 2020

Theresa Kilby  
50 Kerr Parkway Apt. #65  
Lake Oswego, OR 97035

Dear Ms. Kilby:

**SUBJECT: Application: Variance - VAR 20-000564**  
**Applicant: THERESA KILBY**  
**Owner: THERESA KILBY**  
**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 Northeast**  
**Rear Yard Setback and Southwest Side Yard Setback)**  
**Tax Map Key: (3) 1-5-024:066 (Lot 223)**

The Planning Director certifies the **approval** of Variance-20-000564 subject to conditions. The variance will allow a portion of the single-family dwelling to remain with a minimum 27.24-foot rear (northeast) yard setback in lieu of the required 30-foot rear yard setback. It also allows for the detached water tank to remain with 10-foot rear (northeast) yard setback and rear yard open space. These exceptions are in lieu of the required minimum 30-foot rear yard setback and 24-foot rear 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.

The storage shed encroaching into the southeast side yard setback has been removed; therefore, the storage shed is excluded from this variance. (See attached photos)

### **BACKGROUND AND FINDINGS**

1. **Location.** The subject property contains approximately one acre (43,560 sq. ft.) and is in the Hawaiian Paradise Park Subdivision, situated at Kea'au, Puna, Hawai'i. The subject property's street address is 15-1999 17<sup>th</sup> Avenue.

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 16, 2019. The variance application site map was prepared by the applicant/owner. **(See Exhibit A-Site Plan)**

The survey map shows the following setbacks:

- a. The encroachment leaves portion of the single-family dwelling with a minimum 27.24-foot rear (northeast) yard setback in lieu of the required 30-foot rear yard setback.
- b. The encroachment leaves the water tank with a minimum 10-foot side (northeast) yard setback in lieu of the required 30-foot side yard setback and 24-foot open space requirement.

The survey map shows the following encroachment:

- a. Portion of the single-family dwelling encroaches 2.76 feet into the 30-foot rear (northeast) yard setback.
  - b. The water tank encroaches 20 feet into the 30-foot rear (northeast) yard setback and 4 feet into the 24-foot rear yard open space.
6. **County Building Records.** Hawai'i County Real Property Tax office records indicate that the the following building permits were issued.
    - a. Building Permit 920320 issued on February 12, 1992, for the construction of a single-family dwelling consisting of 3 bedrooms, 2 baths, living room, kitchen carport with enclosed utility room and doughboy water tank. Permit finalized on June 25, 1993.
    - b. Building Permit 911665 issued on August 5, 1991, for the construction of a storage shed with deck and lānai. Permit finalized on September 11, 2019.
  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. Department of Public Works, Building Division memorandum January 16, 2020 states: “The water tank should not be within 5’ of the property line. The survey provided does not indicate the dimension so please verify this distance.”
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 14, 2019, and February 14, 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 general public were received.
10. **Time Extension.** The applicant’s variance application was received on December 16, 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 June 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 and the detached water tank into the 30-foot (northeast) rear yard setback and 24-foot side 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 and detached water tank improvements authorized under building permit #920320, was issued on February 12, 1992, and given final inspection approval on June 25, 1993. 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 water tank, encroachments constructed into the affected rear yard setback of the subject property include the following actions:

Relocate the single-family dwelling and detached water tank 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 and detached water tank followed all County requirements

Because the encroachment is within the rear yard setback, to consolidate the subject property with the adjacent rear 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 223") will not meet the minimum rear 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(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 and the detached water tank 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-20-000564 null and void.

Sincerely,



MICHAEL YEE  
Planning Director

LHN:jaa

Theresa Kilby  
June 19, 2020  
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Enclosures: Exhibit A-Site Plan  
Exhibit B - Photo

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

**REVIEWED AND ACCEPTED**

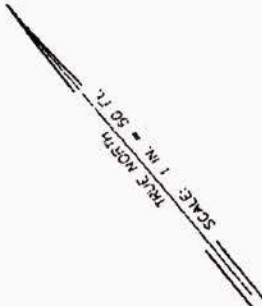
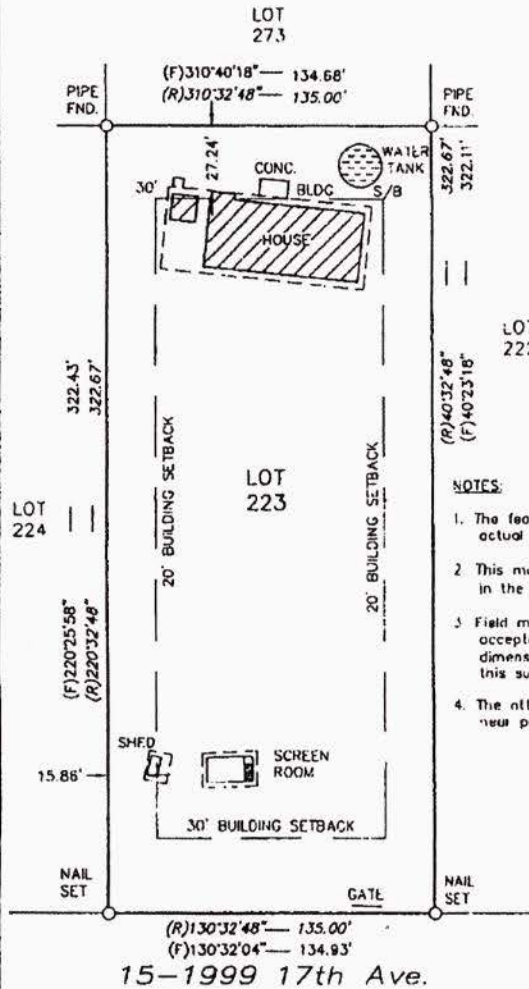
*Theresa Kelly*

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DATE 5/9/2016

**EXISTING CONDITIONS  
UPON LOT 223  
(15-1999, 17th Ave.)  
HAWAIIAN PARADISE PARK**

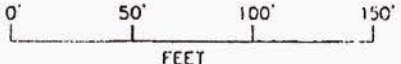
KEAAU, PUNA  
ISLAND OF HAWAII  
HAWAII



This work was prepared by me or under my direct supervision

*Niels Christensen*

Niels Christensen  
Licensed Professional Land Surveyor  
License Number 9077



Date: April 20, 2016  
Drawing: JOB11323.dwg  
TMKs: (3) 1-5-24 66

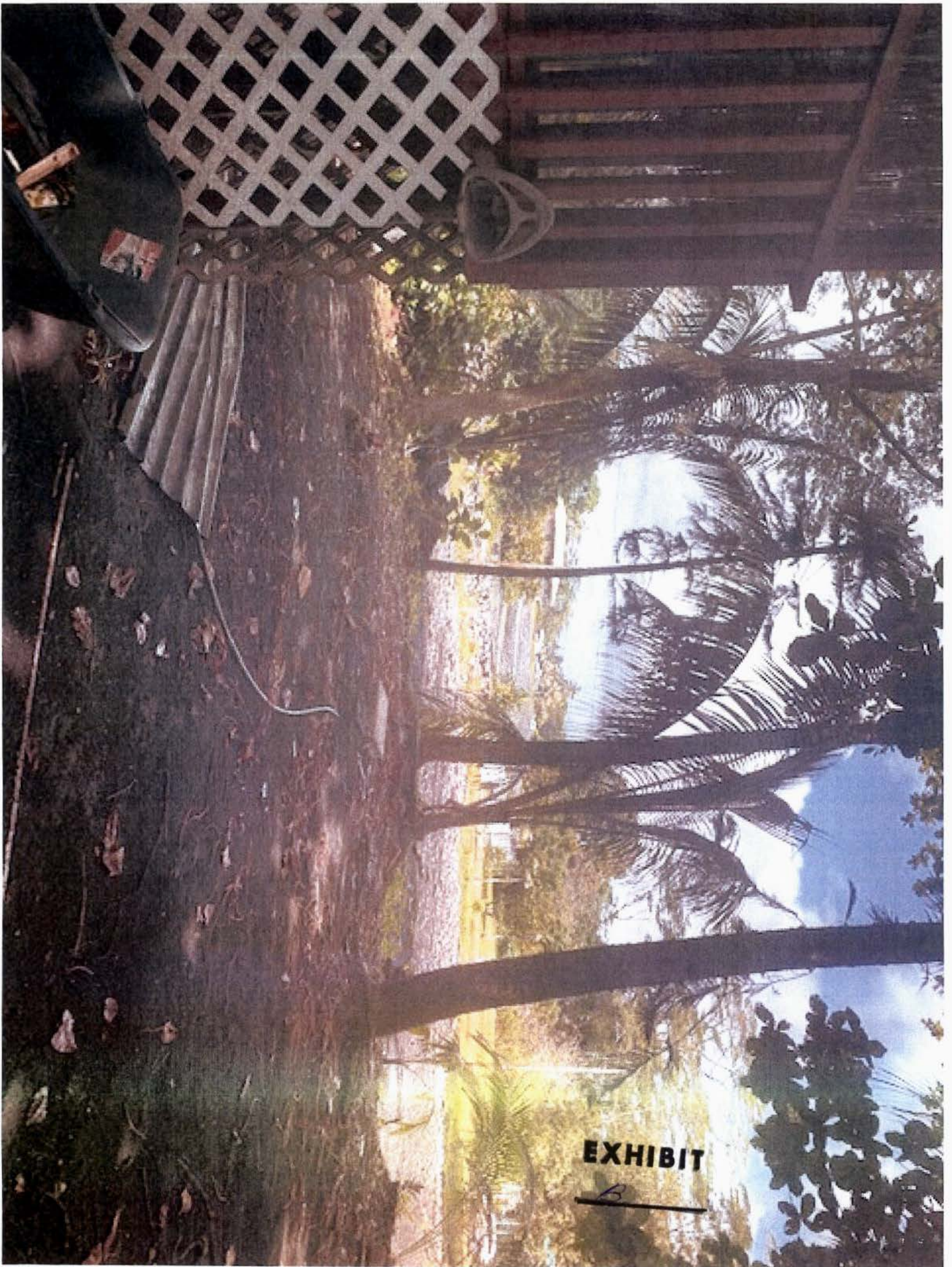
The Independent Hawaii Surveyors, LLC

P.O. BOX 577  
Hilo, HI 96721  
Phone 808 958-0360  
FAX 808 959-0353  
info@hawaiiboundary.com

19°34.164'N, 154°57'287"W COUNTY GIS

**EXHIBIT**

A



**EXHIBIT**  
B