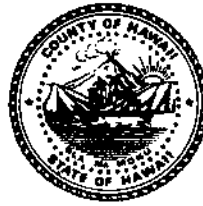


Harry Kim  
Mayor

Roy Takemoto  
Managing Director

West Hawai'i Office  
74-5044 Ane Keohokālole Hwy  
Kailua-Kona, Hawai'i 96740  
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**County of Hawai'i**  
PLANNING DEPARTMENT

Michael Yee  
Director

April Surprenant  
Acting Deputy Director

East Hawai'i Office  
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Hilo, Hawai'i 96720  
Phone (808) 961-8288  
Fax (808) 961-8742

September 17, 2020

Zendo Kern  
Kern & Associates  
194 Wiwoole Street  
Hilo, Hawai'i 96720

Dear Mr. Kern:

**SUBJECT: Application: Variance - VAR 20-000572**  
**Applicant: KERN & ASSOCIATES (ZENDO KERN)**  
**Owner: JILL NORINE SCHULER & JU YON JENNY CHOI**  
**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) 1-3-001:014 (Lot 24)**

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After reviewing your variance application, the Planning Director certifies the **denial** of VAR-20-000572. The variance application seeks to allow the cement water tank to remain entirely into the 20-foot side (south) yard setback and 0.30 feet (3.6 inches) into the adjacent south side yard property (TMK: (3)1-3-001:012). The variance is from 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 applicant has stated that the "as-built" shed will be demolished and replaced with a new permitted shed conforming to building code standards.

The Planning Director has concluded that the variance from the above-referenced zoning standards be **denied** based on the following findings:

**BACKGROUND**

1. Location. The subject property, consisting of approximately 26.394 acres of land, is situated at Kamā'ili, Kalapana, Puna, Hawai'i. The subject property's street address is 13-952 Kamā'ili Road.

2. Zoning. Agricultural – 20 acre (A-20a).
3. State Land Use. Agricultural (A).
4. Required Setback. 30-feet front and rear; 20-feet for sides.
5. Variance Application-Site Plan. The applicant submitted the variance application, attachments, and filing fee on February 5, 2020, and other submittals related to the variance request and variance application.

The variance application's site plan map is drawn to scale and prepared by Daniel L. Berg L.P.L.S. (dlb & associates) and shows the cement water tank encroaches 0.3 feet (3.6 inches) onto the south side yard adjacent property (TMK: (3) 1-3-001:012). (See Exhibit A)

6. County Building Records. Real Property Tax Office records indicate that building permit (881400) issued on July 19, 1988, for the construction of a 3-bedroom and 3-bath, single-family dwelling with office, deck, and cement water tank. Permit finalized on December 13, 2012.
7. Agency Comments and Requirements.
  - a. The State Department of Health (DOH) memorandum dated March 31, 2020, states: "The Health Department found no environmental health concerns with regulatory implications in the submittals."
  - b. The Department of Public Works – Building Division e-mail dated July 9, 2020, states: "The IRC states that a one-hour rated exterior wall, such as a concrete water tank, does not require a setback from the property line or other structures. I would have no objections from the building code point of view."
8. Notice to Surrounding Property Owners. A copy of the first and second notices were sent by the applicant via USPS to surrounding property owners and mailing certificates were submitted to the Planning Department. According to the submittals, the first and second notices were mailed on February 21, 2020, and February 24, 2020, respectively. Notice of this application was published in the Hawai'i Tribune Herald and West Hawai'i Today on February 25, 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.

**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 right 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 with criteria (a) for the following reasons:

There are no special or unusual circumstances applying to the 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 that property.

The variance application's survey map also shows that the cement water tank is situated entirely inside of the 20-foot side (south) yard setback with 0.30 feet (3.6 inches) encroachment into the adjacent side (south) side property (TMK: (3)1-3-001:012).

The applicant has stated in its background report that : "The water tank is within the southern side yard setback and intrudes 0.3 (3.6 inches) into the adjacent Lot A (TMK: parcel 12) which is within the de minimis structural position discrepancy as prescribed in HRS 669-11." This should not detract from the fact that the cement water tank is also located entirely inside of the 20-foot side (south) yard setback. The encroachment does not meet with the requirements of Chapter 25, Zoning, Article 5, Division 7, Section 25-5-76 Minimum Yards, Article 4, Division 4, Section 15-5-44(a) Permitted Projections into yards and Open Space Requirements.

In review of the application materials, county records, and associated documentation, the Planning Department finds that there are no special or unusual circumstances justifying the approval of this variance, since there is a reasonable alternative for the applicant to resolve the encroachment issues.

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

Alternatives available to the current owners to correct and/or address the building encroachments constructed into the adjacent south side yard property include the following actions:

The applicant has stated "The encroachment of removing the encroaching ferrocement water catchment tank to maintain the required 20-foot side yard setback and 14-foot open space setback-while physically possible-would not be reasonable as it would come

at great expense and practical difficulty to the applicant. The catchment tank is ferrocement, practically impossible to move without breaking apart. As such, that alternative-and especially since it is not causing any public harm-is not a reasonable one.” However, a remedy to this encroachment without relocating or removal of the cement water tank would be through a consolidation/resubdivision process, which would allow the cement water tank and storage shed to remain in its current location.

The applicant has submitted an encroachment agreement entered into by the previous owner of the subject property, David M. Gerson and Oscar Raul Jaitt and Gabriele Jaitt owners of the adjacent south side property to address the encroachment of the cement water tank. The encroachment agreement only addresses the issue of the cement water tank encroaching 0.30 feet (3.6 inches) into the adjacent side (south) yard property (TMK: (3) 1-3-001:012).

Therefore, there is a more reasonable alternative to resolve the encroachment issues.

- (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’s welfare or cause substantial, adverse impact to an area’s character or to adjoining properties.*

*The variance application does not meet with criteria (c) for the following reasons:*

The intent and purpose of requiring building setbacks on a lot are to assure that adequate air circulation and exposure to light are available between permitted structure(s)/uses and boundary/property lines.

As mentioned earlier, the water tank is situated entirely into the 20-foot side (south) yard setback with 0.30 feet (3.6 inches) encroaching into the adjacent side (south) yard property (TMK: (3) 1-3-001:012).

Based on the background information and other materials referenced in the variance analysis, the variance to allow for the encroachment into the into the south side yard setback and adjacent side (south) yard property would not be consistent with the general purpose of the zoning district and the intents and purpose of the Zoning code, Subdivision code and the County General Plan since a more reasonable alternative is available.

### **VARIANCE DECISION**

The variance application, VAR 20-000572, concerning the applicant’s request, seeks to allow the cement water tank to remain no side (south) yard setback with a minimum 14.3-foot rear (south) yard setback and the open covered lanai with associated roof eave with a minimum 5.3-foot rear

(south) yard open space in lieu of the required 20-foot side yard setback and the 14-foot side yard open space requirement is hereby **DENIED**.

1. The existing cement water tank shall meet all side yard setback requirements within six (6) months from the date of this letter either by removal or a consolidation/resubdivision action. Written confirmation shall be submitted to the Planning Director when completed.
2. All structures shall conform to be subject to State law and County ordinances and regulations pertaining to building construction and building occupancy.

If compliance with the above has not been met by referenced date, the Department may proceed with enforcement actions against the owner which could include fines or placement of a lien against the property.

In accordance with Ordinance No. 99-112, you may appeal the director's decision as follows:

- (a) Any person aggrieved by the decision of the director in the administration or application of this chapter, may, within thirty days after the date of the director's written decision appeal the decision to the board of appeals.
- (b) A person is aggrieved by a decision of the director if:
  - (1) The person has an interest in the subject matter of the decision that is so directly and immediately affected, that the person's interest is clearly distinguishable from that of the general public; and
  - (2) The person is or will be adversely affected by the decision.
- (c) An appeal shall be in writing, in the form prescribed by the board of appeals and shall specify the person's interest in the subject matter of the appeal and the grounds of the appeal. A filing fee of \$250 shall accompany any such appeal. The person appealing a decision of the director shall provide a copy of the appeal to the director and to the owners of the affected property and shall provide the board of appeals with the proof of service.
- (d) The appellant, the owners of the affected property, and the director shall be parties to an appeal. Other persons may be admitted as parties to an appeal. Other persons may be admitted as parties to an appeal, as permitted by the board of appeals.

The board of appeals may affirm the decision of the director, or it may reverse or modify the decision, or it may remand the decision with appropriate instructions if based upon the preponderance of evidence the board finds that:

- (1) The director erred in its decision; or
- (2) The decision violated this chapter or other applicable law; or
- (3) The decision was arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

In view of the above and for your reference, we have enclosed the GENERAL PETITION FOR APPEAL OF DECISIONS BY PLANNING DIRECTOR form.

Sincerely,



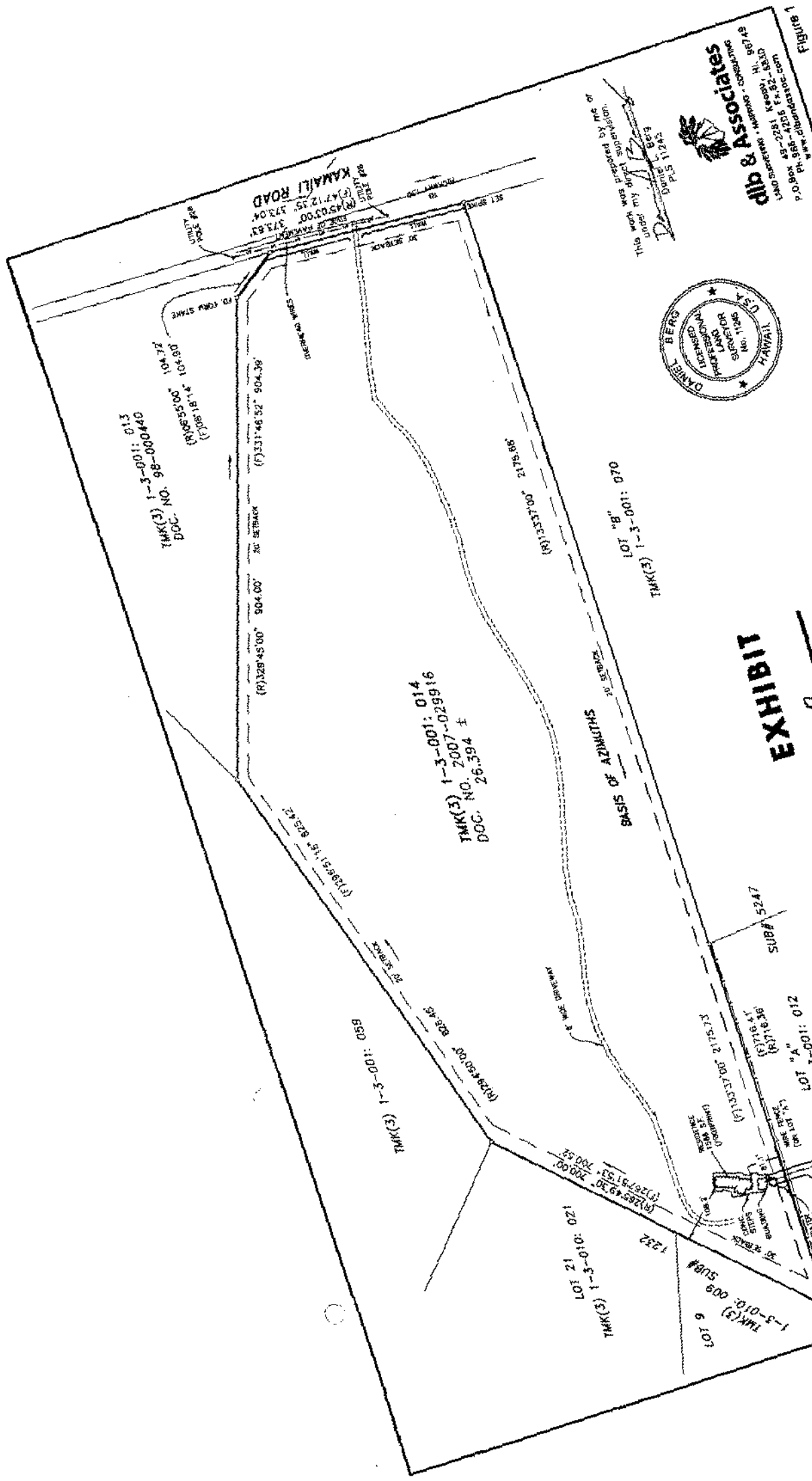
MICHAEL YEE  
Planning Director

LHN/jaa

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Enclosures:                    Exhibit A – Site Plan  
                                      General Petition for Appeal of Decisions by Planning Director form

Cc (via email):                Gilbert Bailado, Planning GIS



This work was prepared by me or under my direct supervision.  
 Daniel Berg  
 PLS 11242

**dlb & Associates**  
 CONSULTANTS  
 1340 S. Kalia Road, Suite 201  
 Honolulu, HI 96813  
 P.O. Box 988-4205  
 Honolulu, HI 96809  
 www.dlbassociates.com

# EXHIBIT A

**Boundary and Improvement Survey**  
 of Lot 2A, Grant 1960 to S.K. Peter  
 of Portion Situated at Kamali, Puna,  
 Island and County of Hawaii, HI

- NOTES: K-2 field survey completed October 18, 2019. As shown on the attached map, the boundary dimensions are as follows:
1. This indicates field measured dimensions. Basis of Azimuths of Lots A and B, as shown, are based on the boundary dimensions of Lot A and B, as shown.
  2. The boundary dimensions are as shown on the attached map, and are based on the boundary dimensions of Lot A and B, as shown.
  3. Doc # 98-000440 (R) indicates a subdivision approved by the Board of Land and Natural Resources, Hawaii, on 10/11/98. Doc # 98-000440 (R) indicates a subdivision approved by the Board of Land and Natural Resources, Hawaii, on 10/11/98. Doc # 98-000440 (R) indicates a subdivision approved by the Board of Land and Natural Resources, Hawaii, on 10/11/98.
  4. In the map and/or report, any dimensions shown are based on the boundary dimensions of Lot A and B, as shown.
  5. This information is provided for your information and should not be used for any other purpose.

DATE: October 22, 2019  
 DRAWN BY: S.K. Peter  
 PROJECT: 2019-241  
 11x17



## County of Hawai'i

### BOARD OF APPEALS

Aupuni Center • 101 Pauahi, Suite 3 • Hilo, Hawai'i 96720  
(808) 961-8288 • Fax (808) 961-8742

## GENERAL PETITION FOR APPEAL OF DECISIONS BY PLANNING DIRECTOR OR PUBLIC WORKS DIRECTOR

(Type or legibly print the requested information. See instructions attached.)

TYPE OF PETITION:

- Appeal of Planning Director's Decision  
 Appeal of Public Works Director's Decision

APPELLANT: \_\_\_\_\_

APPELLANT'S SIGNATURE: \_\_\_\_\_ DATE: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

TELEPHONE: \_\_\_\_\_ (EMAIL): \_\_\_\_\_

APPELLANT'S INTEREST IN THE PROPERTY: \_\_\_\_\_

APPELLANT'S NATURE OF APPEAL AND REQUEST: \_\_\_\_\_

LAND OWNER: \_\_\_\_\_

TAX MAP KEY:(land in question) \_\_\_\_\_ AREA OF PROPERTY: \_\_\_\_\_

STATE LAND USE DESIGNATION: \_\_\_\_\_ COUNTY ZONING: \_\_\_\_\_

STREET ADDRESS OF PROPERTY: \_\_\_\_\_

APPELLANT'S REPRESENTATIVE: \_\_\_\_\_ TITLE: \_\_\_\_\_

REPRESENTATIVE'S SIGNATURE: \_\_\_\_\_ DATE: \_\_\_\_\_

REPRESENTATIVE'S ADDRESS: \_\_\_\_\_

TELEPHONE: \_\_\_\_\_ (EMAIL): \_\_\_\_\_

■ See instructions attached.



## INSTRUCTIONS

### GENERAL PETITION FOR APPEAL OF DECISIONS BY PLANNING DIRECTOR OR PUBLIC WORKS DIRECTOR

Board of Appeals Rules of Practice and Procedure (RPP) can be reviewed in the Planning Department or on the following website: <http://www.cohplanningdept.com/boards-and-committees/>

1. This petition must be accompanied by a filing fee of two hundred fifty dollars (\$250) payable to the County Director of Finance [RPP Section 8-7], and:
2. The original and ten (10) copies of this completed petition with the following:
  - a. A description of the property involved in the appeal in sufficient detail for the public to precisely locate the property.
  - b. A statement explaining the nature of the appeal and the relief requested.
  - c. A statement explaining:
    - (i) How the decision appealed from violates the law; or
    - (ii) How the decision appealed from is clearly erroneous; or
    - (iii) How the decision appealed from was arbitrary or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.
  - d. A clear and concise statement of any other relevant facts.
3. Proof of Service by the Appellant to the Director and all landowners of the affected property, as reflected in County Real Property Tax Division records, if owners are not the Appellants [RPP Section 8-8].
4. A list of the names, address and tax map keys of all owners of property within three hundred feet (300') of the perimeter boundary of the affected property. [RPP Section 8-11(d)]  
If the decision being appealed was made under the Hawai'i County Code (HCC) Zoning Chapter 25 and the affected property is within the state land use agricultural district, Appellant must provide a list of names, address and tax map keys for all owners of property within five hundred feet (500') of the perimeter boundary of the affected property. [HCC Section 25-2-4]

Completed petitions should be remitted to the Board of Appeals, 101 Pauahi Street, Suite 3, Hilo, HI 96720. For questions, please call 808-961-8288 or email [planning@hawaiicounty.gov](mailto:planning@hawaiicounty.gov).