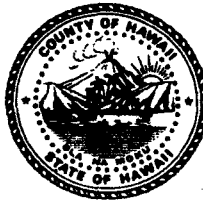


Harry Kim  
Mayor

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 7, 2020

Zendo Kern  
Zendo Kern Planning Consultant LLC  
194 Wiwoole Street  
Hilo, HI 96720

Dear Mr. Kern:

**SUBJECT: Application: Variance - VAR 20-000576**  
**Applicant: KERN AND ASSOCIATES**  
**Owners: MARTHA ANN MILLER**  
**Request: Variance from Chapter 25, Zoning, Article 5, Division 1,**  
**Section 25-5-7, Minimum Yards Requirements and**  
**Section 25-4-44(a) Permitted Projections into Yards and**  
**Open Spaces (Encroachments into West Side Yard and**  
**Open Space Requirement)**

**Tax Map Key: (3) 7-8-020:003 Lot 24**

The Planning Director certifies the **approval** of Variance No. 20-000576, subject to variance conditions. The variance will allow portions of an 8-foot tall lattice fence built upon the wood pool deck, constructed at 3 to 5 feet above grade, to remain with minimum 0.4-foot to 0.5 foot west side setback, and pool deck to remain with a minimum 0.4-foot to 0.5 west side setback in lieu of the required 10-foot west side yard setback and 5.0-foot open space requirement. The above grade pool, less than 6 feet above grade, is located 5.1 feet from the west side property line is a permitted projection per Section 25-4-44(a). These exceptions are in lieu of the required 10-foot side yard setback, and 5.0-foot open space requirement as required by the Hawai'i County Code, Chapter 25, Zoning, Section 25-5-7, Minimum yards requirements, and Section 25-4-44(a) Permitted Projections into Yards and Open Spaces.

**BACKGROUND AND FINDINGS**

1. **Location.** The subject property, Lot 24, contains approximately 11,158 square feet and is situated within "Keauhou Subdivision" – Area 5, Keauhou 1<sup>st</sup>, North Kona, Hawai'i. The subject property's street address is 78-292 Manukai Street, Kailua Kona, HI .

2. **County Zoning.** Single-Family Residential District (RS-10).
3. **State Land Use Designation.** Urban.
4. **Setback Requirements.** 20 feet front and rear and 10 feet for sides.
5. **Variance Application.** The applicant/owner submitted the variance application, attachments, filing fee, and associated materials on February 6, 2020. The variance application's survey map dated November 23, 2014 was prepared by Kevin McMillan, LPLS and denotes that portions of 8-foot tall lattice wall and wood pool are built into the side (west) yard setback. **(See Exhibit A-Site Plan)**

The survey map dated November 23, 2014 shows a portions of 8-foot tall lattice fence and wood pool deck, constructed at 3 to 5 feet above grade, built into the side (west) yard setback, encroaching 9.6-feet to 9.5-feet with a minimum 0.4-foot and 0.5-foot side (west) yard setbacks, in lieu of the required 20 foot-rear yard setback and in lieu of the 5.0-foot open space requirement.

The encroachment leaves a minimum 0.5-foot to 0.6-foot side (west) yard setback, in lieu of the required 10.0-foot side (west) yard setback, 0.5-feetto 0.6-feet side (west) open space requirement in lieu of the 5.0-foot open space requirement.

6. **County Building Records.** Hawai'i County Real Property Tax (RPT) Office records indicate that a building permit (#026377) was issued on October 7, 2002 with associated electrical and plumbing permits for a solar water heater. Building permit (#K06381) was issued on June 21, 1984 for an addition.
7. **Real Property Tax Records:** The Real Property Tax (RPT) Historical Field Books records included building permits for the dwelling (#2889) issued on September 6, 1978, building permit issued for the pool (#06509) on September 24, 1984, and a building permit for an addition (building permit # 06381) issued on June 21, 1984. A sketch the dwelling, pool and garage and lanai.
8. **Agency Comments and Requirements.**
  - a. State Department of Health (DOH) email dated April 3, 2020. "The Health Department found no environmental health concerns with regulatory implications in the submittals."
  - b. Department of Public Works - Building Division – Memo dated March 18, 2020. (Attached.)
9. **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 March 11, 2020 and March 12, 2020, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on March 12, 2020.

10. **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.

11. **Time Extension.** A time extension request was granted on April 6, 2020 and on July 7, 2020.

### **GROUNDS FOR APPROVING VARIANCES**

#### **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 an 8-foot tall lattice fence built upon a wood pool deck, constructed at 3 to 5 feet above grade, to remain with a minimum 0.4-foot to 0.5-foot west side setback, and pool deck to remain with a minimum 0.4-foot west side setback in lieu of the required 10-foot west side yard setback and 5.0-foot open space requirement.

The survey map dated November 23, 2014 shows a portions of 8-foot tall lattice fence and wood pool deck, constructed at 3 to 5 feet above grade, built into the side (west) yard setback, encroaching 9.5-feet to 9.6-feet with a minimum 0.4-foot to 0.5 foot side (west) yard setbacks, in lieu of the required 10 foot-side (west) yard setback and in lieu of the 5.0-feet open space requirement.

The encroachment leaves a minimum 0.4-foot to 0.5-foot side (west) yard setback, in lieu of the required 10.0-foot side (west) yard setback, and 0.4-feet to 0.5-foot side (west) open space requirement in lieu of the 5.0-feet open space requirement.

According to the applicant, the encroachments were revealed during the survey performed for the recently purchased dwelling by Ms. Miller in June 2019. The setback encroachments were revealed in a survey performed by KKM Surveys for the previous sale of the property in 2014. Since purchasing the property, the applicant has been working to resolve the issue, and according to the RPT website, all alterations to the home, including enclosing the pool were permitted and

inspected (refer to Real Property Tax Records-Item 7).

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 deck and swimming pool improvements constructed in 1984, approximately 36 years ago, and 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:

Remove the 8-foot tall lattice fence built atop of the pool deck encroachments and/or redesign the lattice fence and pool deck on the survey map to fit within the correct building envelope as prescribed by the Zoning Code. Per the Zoning Code, Section 25-4-43(a) a perimeter boundary fence is permitted without any front, side or rear yard requirements if it is six feet or less or up to a height or eight feet if it is constructed of a "see through" material. The 8-foot tall lattice fence is considered "see through" material, however, it is built atop of the wood deck, which is constructed 3 to 5 feet above grade, making the total height of the fence approximately 11 to 13 feet overall, and is therefore, subject to side yard and open space requirements, as cited previously. The alternative is to rebuild or cut back the lattice fencing and wood deck 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 swimming pool and related improvements were in compliance with all County requirements. Any structural or design correction of the single-family dwelling to meet setback requirement would leave unattractive reconstruction scars.

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 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 dwelling has been in existence for approximately 36 years and was constructed under valid building 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.

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.

This can be substantiated, to some degree, by the fact that no comments or objections were received from the surrounding property owners or general public in response to the Notification of Surrounding Properties Owners.

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 on the subject property ("LOT 24") will not meet the minimum front yard pursuant to Hawai'i County Code, Chapter 25, (Zoning Code).

This variance application is approved subject to the following variance conditions:

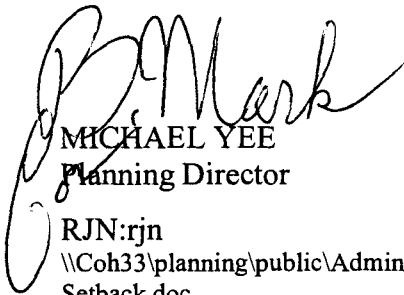
1. The applicant/owner, their assigns or successors shall be responsible for complying with all stated conditions of approval.
2. The applicant/owner(s), successors or assigns shall indemnify and hold the County of

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 8-foot tall lattice fence and wood pool deck, constructed 3 to 5 feet above grade, located within the side (west) yard, 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 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.

Should any of the foregoing variance conditions not be complied with, the Planning Director may initiate proceedings to null and void Variance-20-000576.

Sincerely,



MICHAEL YEE  
Planning Director

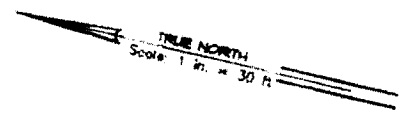
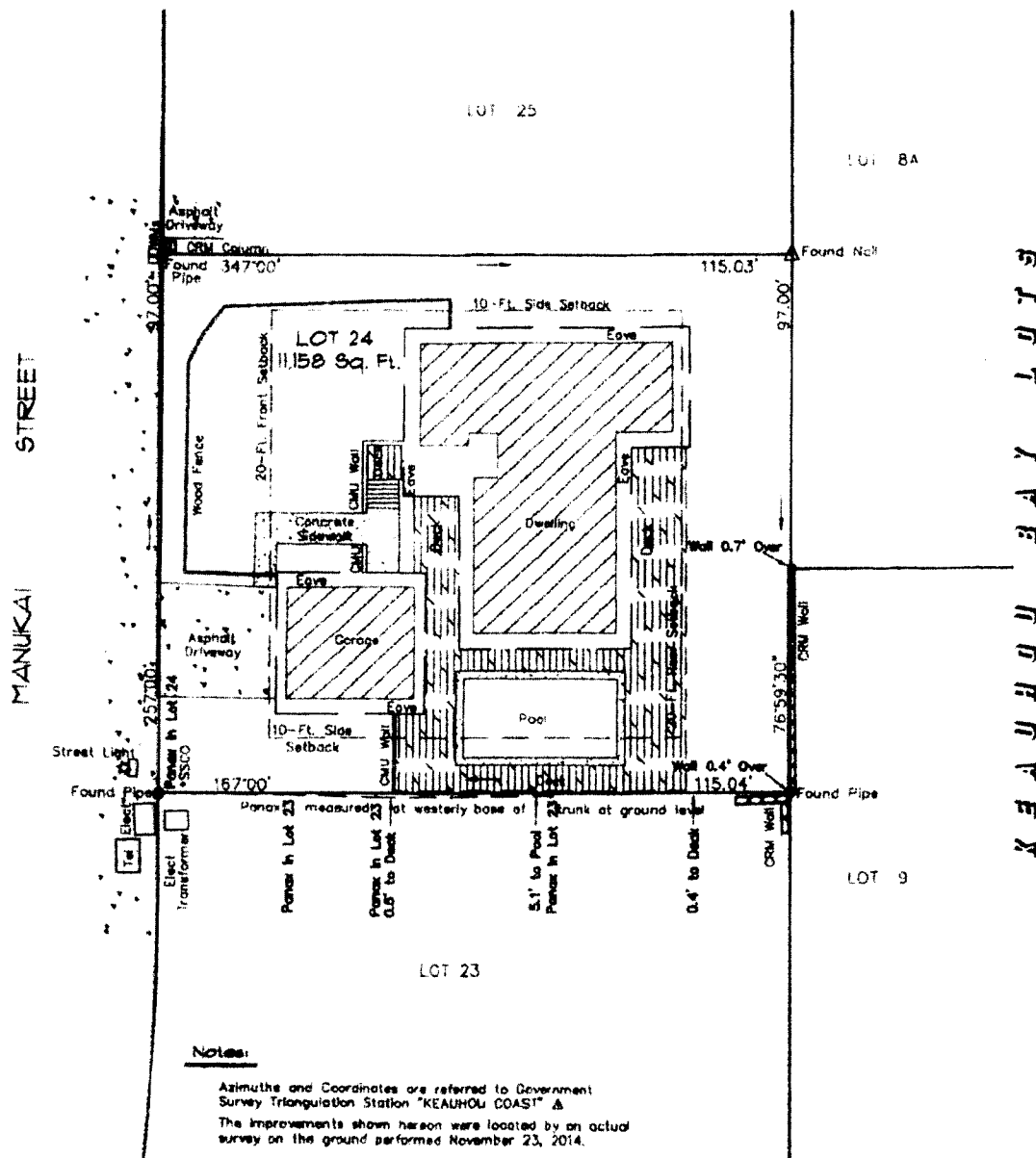
RJN:rjn

\\Coh33\planning\public\Admin Permits Division\Variance\2020\VAR-20-000576-Miller\VAR-20-000576 Miller - Setback.doc

Zendo Kern  
Zendo Kern Planning Consultant LLC  
July 7, 2020  
Page 7

xc: Natalie Whitworth, DPW Engineering Division  
Real Property Tax Office (Kona)  
Gilbert Bailado, GIS

Martha Ann Miller  
150 Woodchuck Lane  
Cave Junction, OR 97523-9727



K-2 (HAR) SURVEY MAP  
 OF LOT 24  
 KEAUHOU SUBDIVISION  
 AREA FIVE  
 AT KEAUHOU 1st, NORTH KONA  
 ISLAND, COUNTY AND STATE OF HAWAII  
 Tax Map Key (3rd Division): 7-8-20-03



THIS WORK WAS PREPARED BY ME  
 OR UNDER MY SUPERVISION  
*Kevin McMiller*  
 DATE: 11/24/2014

**KKM SURVEYS**  
 P. O. Box 2494  
 Kailua-Kona, Hawaii 96745  
 Phone (808) 326-4633  
 Email: kcmillen@hawaii.rr.com

**Notes:**  
 Azimuths and Coordinates are referred to Government  
 Survey Triangulation Station "KEAUHOU COAST" Δ  
 The improvements shown hereon were located by an actual  
 survey on the ground performed November 23, 2014.

"EXHIBIT A"



DAVID Y. IGE  
GOVERNOR OF HAWAII



STATE OF HAWAII  
DEPARTMENT OF HEALTH  
P.O. BOX 916  
HILO, HAWAII 96721-0916

PLANNING DEPARTMENT  
BRUCE S. ANDERSON, Ph.D.  
DIRECTOR  
County of Hawaii  
74-5044 Ane Keohokalole Hwy  
Kailua-Kona, HI 96740

RECEIVED APR - 7 2020

MEMORANDUM

DATE: April 03, 2020

TO: Mr. Michael Yee  
Planning Director, County of Hawaii

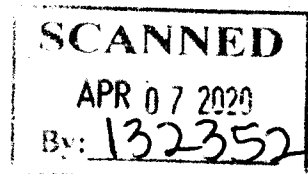
FROM: Eric Honda  
District Environmental Health Program Chief

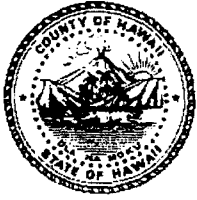
SUBJECT: Application: Variance VAR-20-000576  
Applicant: ZENDO KERN PLANNING CONSULTANT LLC  
Owner: MARTHA ANN MILLER  
Request: Variance from Chapter 25, Zoning, Article 5 Division 1  
Section 25-5-7 Minimum Yard Requirement and  
Section 25-4-44, Permitted Projections into Yards and  
Open Spaces  

---

[Encroachment into West Side Yard Setback and  
Open Space Requirement]  
TMK: (3) 7-8-020:003

The Health Department found no environmental health concerns with regulatory implications in the submittals.





## BUILDING DIVISION – DPW

COUNTY OF HAWAII – 101 Pauahi Street, Suite 7 – Hilo, Hawai'i 96720  
Hilo Office (808) 961-8331 • Fax (808) 961-8410 Kona Office (808) 323-4720 • Fax (808) 327-3509

March 18, 2020

To: BENNETT MARK

SUBJECT: VAR 20-000576

TMK: (3) 7-8-020:003

This is to inform you that our records on file, relative to the status of the subject discloses that:

- No \_\_\_\_\_ permit was issued for work done on the premise.
- No building permit was issued for the change of occupancy.
- At the time of completion, the subject complied with all building regulations that were in effect.
- Variance from any building regulation (Building, Electrical, Plumbing, or Sign) was/was not granted.
- The following violation(s) still outstanding:
  - Building
  - Electrical
  - Plumbing
  - Sign
- Others:

This status report reflects Building Division records only and does not include information from other agencies.

Should you have any questions regarding matters contained herein, please feel free to contact Owen Okamoto at phone no. (808) 323-4724

