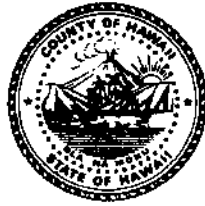


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September 16, 2020

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

Dear Zendo:

SUBJECT: Application: Variance - VAR 20-000589
Applicant: KERN & ASSOCIATES (ZENDO KERN)
Owner: DEVALYNN RHONDA LEHUA GRAGAS
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) 1-8-062:060 (Lot 76)

The Planning Director certifies the **approval** of Variance 20-000589, subject to conditions. The variance will allow for the single-family dwelling to remain with a minimum 9.46 feet side (south) yard setback. These exceptions are in lieu of the required 10-foot side yard setback as required by the Hawai'i County Code, Chapter 25, Zoning, Section 25-5-76, Minimum yards and Section 25-4-44 (a), Permitted projections into yards and open space requirements.

BACKGROUND AND FINDINGS

1. **Location.** The subject property contains approximately 12,005 square feet and is in the Aloha Estates Subdivision, portion of Ola'a, Puna, Hawai'i. The subject property's street address 18-1979 Hāpu'u Nani Road.
2. **County Zoning.** Agricultural – 1 acre (A-1a).
3. **State Land Use Designation.** Agricultural.

4. **Required Setback.** 20 feet for front and rear; 10 feet for sides.
5. **Variance Application.** The applicant/owner submitted the variance application, attachments, filing fee, and associated materials on June 12, 2020. The variance application site map was prepared by Niels Christensen, LPLS (The Independent Hawai'i Surveyors, LLC). (See **Exhibit A-Site Plan**)

The single-family dwelling encroaches 0.54 feet (6.48 inches) into the 10-foot side (south) yard setback.

The encroachment leaves the single-family dwelling with a minimum 9.46-foot side (south) yard setback, in lieu of the required 10-foot side yard setback.

6. **County Building Records.** Real Property Tax Office records indicate that building permit (B2005-2661H) was issued on December 17, 1974, for the construction of a 3-bedroom and 1 bath, single-family dwelling.
7. **Agency Comments and Requirements.**
 - a. State Department of Health (DOH) memorandum dated August 4, 2020: "The Health Department found no environmental health concerns with regulatory implications in the submittals."
 - b. No comments received from the Department of Public Works, Building Division (DPW).
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 July 9, 2020. Notice of this application was published in the Hawai'i Tribune Herald and West Hawai'i Today on July 10, 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 October 12, 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 10-foot (South) side yard setback.

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 improvements authorized under building permit 61376, was issued on December 17, 1974. 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 encroachments 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 side 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 76) will not meet the minimum 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(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.

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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-20-000589 null and void.

Sincerely,



MICHAEL YEE
Planning Director

LHN:jaa

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Encl: Exhibit A - Site Plan

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

EXHIBIT

A

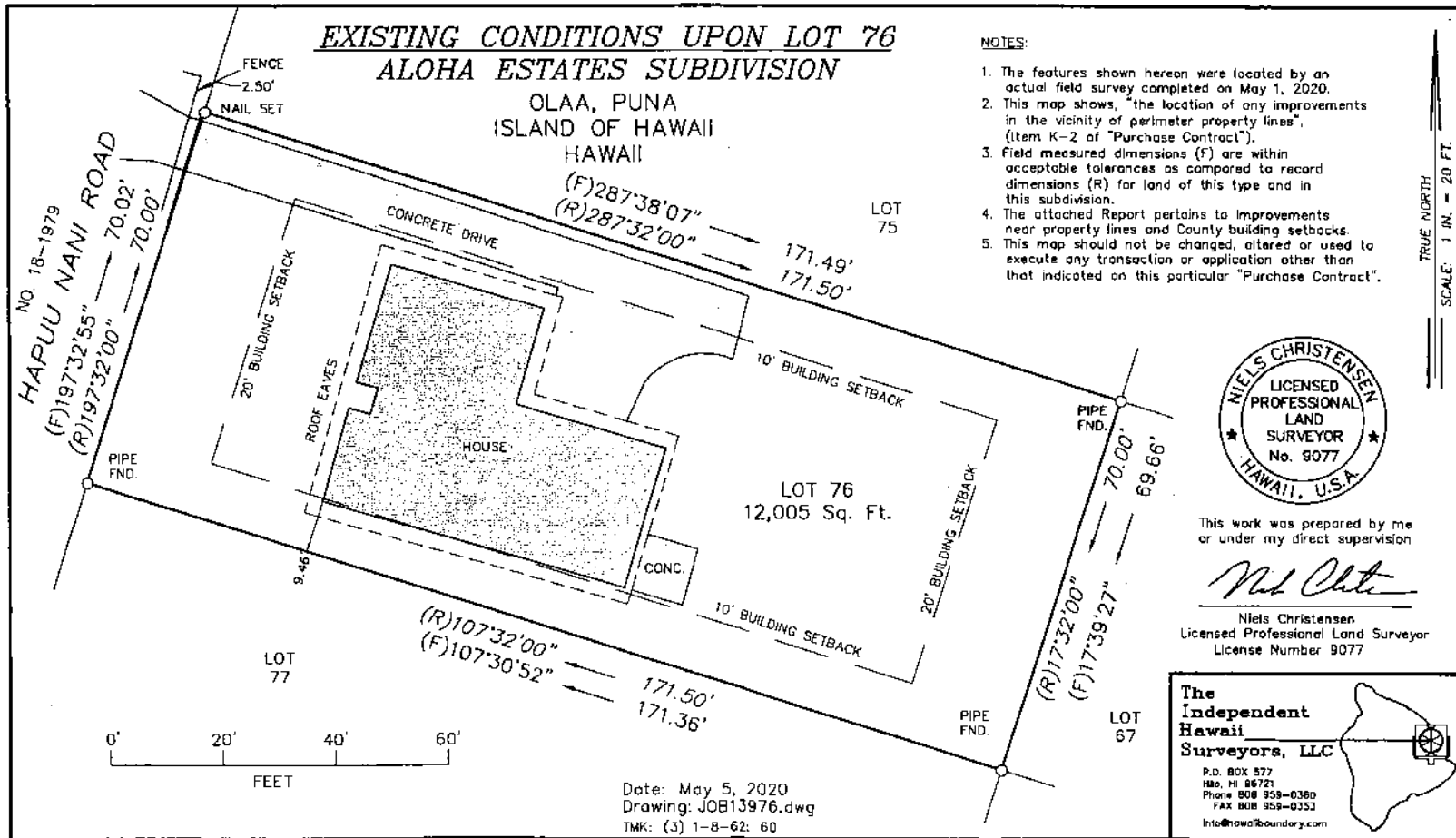


Figure 1