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**County of Hawai'i**  
**PLANNING DEPARTMENT**

Michael Yee  
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November 23, 2020

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

Dear Mr. Kern:

**Application:** Variance – VAR-20-000592  
**Applicant:** KERN & ASSOCIATES  
**Owners:** WARREN TAYLOR HUCKABAY  
KATHLEEN DOROTHY HUCKABAY  
**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  
(Encroachment into West Side Yard Setback and Open  
Space Requirement)

**Tax Map Key: (3) 6-8-014:047 Lot 308**

The Planning Director certifies the approval of Variance No. 20-000592, subject to variance conditions. The variance will allow portions of the dwelling walls to remain with minimum 9.0-foot side (west) yard setbacks, in lieu of the required 10.0-foot side yard setback, and roof eaves to remain with minimum 4.0-foot open space requirement in lieu of 5.0-foot required open space requirement. These exceptions are in lieu of the required 10.0-foot side (west) yard setback and 5.0-foot side (west) 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, Permitted projections into yards and open spaces.

**BACKGROUND AND FINDINGS**

1. **Location.** The subject property, Lot 308, contains approximately 11,247 square feet and is situated within "Waikoloa Village" – Unit 1-C, Waikoloa, South Kohala, Hawai'i. The subject property's street address is 68-1872 Pua Niu Street, Waikoloa, HI 96738.

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 June 9, 2020. The variance application's survey map dated April 21, 2020 was prepared by Crystal T. Yamasaki LPLS and denotes that portions of the second story of the single-family dwelling are built into the side (west) yard setback and roof overhangs (eaves) encroach into the side (west) open space requirement. (See **Exhibit A-Site Plan**)

The survey map dated April 21, 2020 shows a portions of the second story of the single-family dwelling is built into the side (west) yard setback, encroaching 1.0-feet into the 10.0-foot side yard with a minimum 9.0-foot (west) yard setbacks, in lieu of the required 10-foot side yard setback and the roof overhangs (eaves) encroaching 1.0-feet into the minimum 5.0-foot (west) side yard open space requirement.

The encroachment leaves a minimum 9.0-foot side (west) yard setback, in lieu of the required 10.0-foot side (west) yard setback, 4.0-foot 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 (#BK2015-02609) was issued on November 3, 2015 for a new 2-level dwelling and associated electrical and plumbing permits, and building permit (#BK2016-00558) for an addition of an art room at the lower level and other modifications.
8. **Agency Comments and Requirements.**
  - a. State Department of Health (DOH) – No comments received as of this date.
  - b. Department of Public Works - Building Division – No comments received as of this date.
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 August 6, 2020 and August 7, 2020, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on August 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 September 18, 2020, October 19, 2020, and November 23, 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 portions of the second story dwelling walls and roof eaves into the 10.0-foot side (west) yard setback and encroachment of portions of the roof overhangs (eaves) encroaching into the side (west) open space requirement, as required by the Zoning Code.

The survey map dated April 21, 2020 shows a portions of the second story of the single-family dwelling is built into the side (west) yard setback, encroaching 1.0-foot into the 10.0-foot side yard with a minimum 9.0-foot (west) yard setbacks, in lieu of the required 10-foot side yard setback and the roof overhangs (eaves) encroaching 1.0-foot into the minimum 5.0-foot (west) side yard open space requirement.

The encroachment leaves a minimum 9.0-foot side (west) yard setback, in lieu of the required 10.0-foot side (west) yard setback, 4.0-foot side (west) open space requirement in lieu of the 5.0-foot open space requirement.

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 original dwelling improvements was constructed in 2017, approximately 3 years ago, and it also appears that 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.

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 building encroachments and/or redesign the southwesterly portions of the second story of the dwelling denoted on the survey map 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 was 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 3 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**

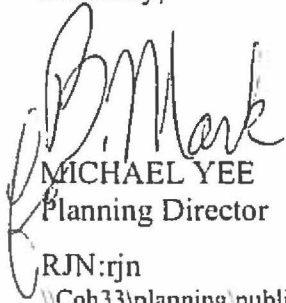
Based on the variance application's survey map, the single-family dwelling built on the subject property ("LOT 308") will not meet the minimum side (west) yard and side yard (west) open requirements pursuant to Hawai'i County Code, Chapter 25, (Zoning Code).

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

1. The applicant/owner, 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 dwelling walls and roof overhangs (eaves) 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-20-000592.

Sincerely,



MICHAEL YEE  
Planning Director

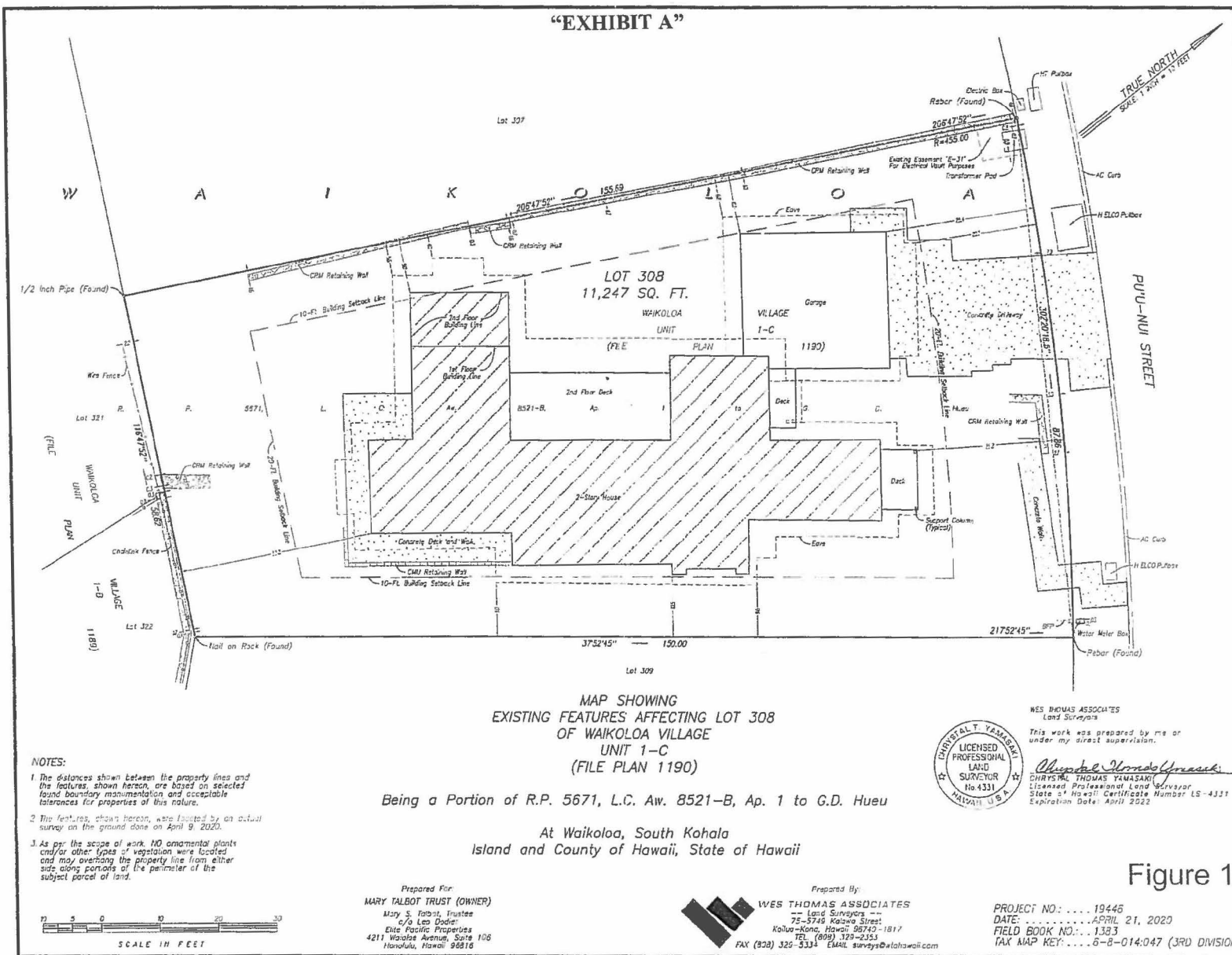
RJN:rjn

\\Coh33\planning\public\Admin Permits Division\Variance\2020\VAR-20-000592 Huckabay - Setback\Hickabay - approval.doc

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

Warren Taylor Huckabaay  
Kathleen Dorothy Huckabay  
P.O. Box 384989  
Waikoloa, HI 96738-4989

"EXHIBIT A"



MAP SHOWING  
 EXISTING FEATURES AFFECTING LOT 308  
 OF WAIKOLOA VILLAGE  
 UNIT 1-C  
 (FILE PLAN 1190)

Being a Portion of R.P. 5671, L.C. Aw. 8521-B, Ap. 1 to G.D. Hueu

At Waikoloa, South Kohala  
 Island and County of Hawaii, State of Hawaii

NOTES:

1. The distances shown between the property lines and the features, shown herein, are based on selected found boundary monumentation and acceptable tolerances for properties of this nature.
2. The features, shown herein, were located by an actual survey on the ground done on April 9, 2020.
3. As per the scope of work, NO ornamental plants and/or other types of vegetation were located and may overhang the property line from either side, along portions of the perimeter of the subject parcel of land.



Prepared For:  
**MARY TALBOT TRUST (OWNER)**  
 Mary S. Talbot, Trustee  
 c/o Leo Dodge  
 Elite Pacific Properties  
 4211 Waialae Avenue, Suite 106  
 Honolulu, Hawaii 96816

Prepared By:  
**WES THOMAS ASSOCIATES**  
 -- Land Surveyors --  
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WES THOMAS ASSOCIATES  
 Land Surveyors  
 This work was prepared by me or  
 under my direct supervision.  
*Cheryl Thomas Yamasaki*  
**CHERYL THOMAS YAMASAKI**  
 Licensed Professional Land Surveyor  
 State of Hawaii Certificate Number LS-4331  
 Expiration Date: April 2022

Figure 1

PROJECT NO.: 19446  
 DATE: APRIL 21, 2020  
 FIELD BOOK NO.: 1383  
 TAX MAP KEY: 6-B-014:047 (3RD DIVISION)