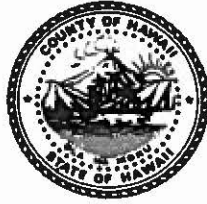


Mitchell D. Roth
Mayor

Lee E. Lord
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

Zendo Kern
Director

Jeffrey W. Darrow
Deputy Director

East Hawai'i Office
101 Pauahi Street, Suite 3
Hilo, Hawai'i 96720
Phone (808) 961-8288
Fax (808) 961-8742

March 11, 2021

Brandy Young, Manager
American Drafting and Design, LLC
P.O. Box 1459
Roswell, GA 30077

Dear Brandy Young:

SUBJECT: Application: Variance from Zoning Code – VAR-21-000610
Applicant: AMERICAN DRAFTING AND DESIGN, LLC
Owner: BRANDON CLAY ROGERS AND MELISSA KING ROGERS
Request: Variance from Chapter 25, Zoning, Article 5 Division 7, Section 25-5-76 Minimum Yards (Encroachment into Western Front Yard Setback and Northern and Southern Side Yard Setback)
Tax Map Key: (3) 6-4-027:022 (Lot 34)

The Planning Director certifies the **approval** of Variance Permit No. 21-000610, subject to the variance conditions stated herein. The variance will allow portions of the single-family dwelling with garage to remain "AS-BUILT" with the following setbacks, as shown on the attached survey map dated November 7, 2020 (See Exhibit A-Site Plan). The approved setbacks are as follows:

- a. A minimum front yard setback ranging from 19.25 feet to 19.44 feet along the northwest to southwest side of the garage in lieu of the minimum 20-foot front yard setback requirement.
- b. A minimum side yard setback ranging from 7.15 feet to 7.19 feet along the northeast to northwest side of the garage in lieu of the minimum 10-foot side yard setback requirements.
- c. A minimum side yard setback ranging from 9.58 feet to 9.76 feet along the northwest to northeast side of the dwelling in lieu of the minimum 10-foot side yard setback requirements.

- d. A minimum side yard setback of 9.78 feet on the southwest corner of the dwelling in lieu of the minimum 10-foot side yard setback requirements.

These exceptions are in lieu of the required 20-foot front yard setback and 10-foot side yard setback, as required by Chapter 25 (Zoning) of the Hawai'i County Code. There are no encroachments to the building overhangs (eaves) identified on the survey map.

Additionally, this approval of the setbacks specified above include the De Minimis approval of the encroachments that are less than 0.75 feet, which are recognized as De Minimis Structure Position Discrepancies in accordance with Article 4 Division 7 of Chapter 25 (Zoning) of the Hawai'i County Code.

Please note that this variance approval excludes the boundary line encroachment of the fence onto the adjacent Lot 36, as shown and identified on the survey map, as boundary line encroachments may not be resolved by a variance application.

BACKGROUND AND FINDINGS

1. **Location.** The subject property is approximately 10,000 square feet in size and is identified as "Lot 34" in the Hoonani Subdivision at Waimea, South Kohala, Hawai'i. The subject property's street address is 64-5256 Kipahele Street.
2. **County Zoning.** Agricultural – 1 acre (A-1a).
3. **State Land Use Designation.** Agricultural.
4. **Required Yards (Setbacks).** 20-foot front and rear yards; 10-foot side yards.
5. **Variance Application.** The applicant/owner submitted the variance application, attachments, filing fee, and associated materials on January 6, 2021. The variance application included a survey map of the site that was prepared by Thomas G. Pattison of Pattison Land Surveying and is dated November 7, 2020 (See Exhibit A-Site Plan).

The survey map identifies the following encroachments and "AS-BUILT" setbacks:

- a. An encroachment ranging from 0.75 feet to 0.56 feet resulting in a minimum front yard setback ranging from 19.25 feet on the northwest corner of the garage to 19.44 feet on the southwest corner of the garage, in lieu of the minimum 20-foot front yard setback requirement.
- b. An encroachment ranging from 2.85 feet to 2.81 feet resulting in a minimum side yard setback ranging from 7.15 feet on the northeast corner of the garage to 7.19 feet on the

northwest corner of the garage, in lieu of the minimum 10-foot side yard setback requirements.

- c. An encroachment ranging from 0.42 feet to 0.24 feet resulting in a minimum side yard setback ranging from 9.58 feet on the northwest corner of the dwelling to 9.76 feet on the northeast corner of the dwelling, in lieu of the minimum 10-foot side yard setback requirements.
 - d. An encroachment of 0.22 feet resulting in a minimum side yard setback of 9.78 feet on the southwest corner of the dwelling, in lieu of the minimum 10-foot side yard setback requirements.
- 6. County Building Records.** The Hawai'i County Real Property Tax office records indicate the following building permits were issued:
- a. Building Permit no. 860737, issued on April 29, 1986, for the construction of a three (3) bedroom, two (2) bath single-family dwelling with garage, with final inspection completed on August 22, 1986.
 - b. Building Permit no. 870495, issued on March 23, 1987, for the enclosure and conversion of the existing carport into a recreation room, and for a new open carport addition to the new recreation room, with final inspection completed on June 18, 2018.
- 7. Agency Comments and Requirements.**
- a. The Department of Public Works, Building Division Notice dated February 19, 2021:

"At the time of completion, the subject complied with all building regulations that were in effect. Records show all permits are complete." (See Exhibit B)
 - b. No comments were received from the State Department of Health (DOH).
- 8. Public Notice.** The applicant filed transmittal letters with copies of the first and second notices and USPS Certified Mail Receipts as proof of service to surrounding property owners and/or lessees within five hundred feet of the subject building site affected by the Variance application. According to the USPS Certified Mail Receipts, the first and second notices were mailed on February 2, 2021 and February 9, 2021, respectively. Notice of this Variance application was also published in the West Hawai'i Today and Hawai'i Tribune Herald on January 16, 2021

9. Comments from Surrounding Property Owners or Public.

- a. Objection letter received from Eloise Pung, received on February 8, 2021 (See Exhibit C).

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 has submitted the variance application to address or resolve the encroachment of the single-family dwelling into the 20-foot (western) front yard setback and the 10-foot (northern and southern) side yard setback.

The application indicates that the previous owner was recently made aware of the existing setback encroachments after a land survey was conducted on the subject parcel while in the process of selling the property. As such, the owner is seeking a variance to resolve the encroachment issues, thereby restoring compliance to the subject single-family dwelling, while also avoiding loss of property value and maintaining full and best use of the subject property.

According to Real Property Tax records, the construction of the subject single-family dwelling was authorized under building permit nos. 860737 and 870495, issued April 29, 1986 and March 23, 1987, respectively. Furthermore, according to comments received from the Department of Public Works, Building Division, at the time of completion, the construction of the subject single-family dwelling was done in compliance with all building regulations that were in effect at that time, and all permits were completed. This indicates that the past owners or builders acquired the necessary permits and/or inspections required to construct the subject single-family dwelling, which demonstrated their intent to construct the dwelling in accordance with applicable County Codes and/or State laws. As such, 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. Additionally, it appears that building permit inspections of the premises by the affected agencies during construction of the single-family dwelling and subsequent additions and alterations did not disclose any building encroachment issues or building setback irregularities at that time. Nor has there been

any complaints or violations issued on the subject property relating any setback encroachments on the subject property.

Therefore, based on the above, 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 front and side yard setback areas 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, since the previous owners or builders complied with the building permit and inspections process and were under the impression that the single-family dwelling was constructed in conformance with all applicable County code and State law requirements.

Consolidate the subject property with the adjacent front and side yard parcels and re-subdivide the property to modify the property lines and adjust the minimum front and side yard setback areas accordingly. This alternative would not be a viable option as the adjacent parcels located on either side of the subject parcel are under separate ownership, and the parcel located adjacent to the front yard setback area is a public roadway.

Therefore, both alternatives are not practical and offers no reasonable alternative to resolve the difficulty.

(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.

Pursuant to Section 25-5-76 of Hawai'i County Code Chapter 25 (Zoning), the minimum yard setback requirements for the subject property are 20-foot front and rear yards (with a minimum 14-foot open space requirement), and 10-foot side yards (with a minimum 5-foot open space requirement). Furthermore, in accordance with Article 4 Division 7 of Hawai'i County Code, Chapter 25 (Zoning), encroachments that are not more than 0.75 feet in the Agricultural zoning district may be eligible for recognition of a De Minimis Structure Position Discrepancy.

While the survey map identifies several encroachments within the front and side yard setback areas, most of the encroachments identified are minimal and meet the De Minimis Structure Position Discrepancy allowance for encroachments less than 0.75 feet, with the exception of the encroachment of the garage into the northern side yard setback area. Furthermore, there are no encroachments of roof overhangs (eaves) identified on the survey map or in the application. Therefore, the minimum 14-foot front yard open space and minimum 10-foot side yard open space requirements are being maintained as open and unobstructed. Additionally, as previously stated, no evidence has been found to show indifference or premeditation by the owners or builders to deliberately create or intentionally allow the building encroachment problem 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 with garage built on the subject property ("Lot 34") will not meet the minimum front and side yard requirements pursuant to Hawai'i County Code, Chapter 25 (Zoning Code).

This variance application is approved subject to the following 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

Brandy Young, Manager
American Drafting and Design, LLC
March 11, 2021
Page 7 of 7

applicant/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 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" or Farm 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 proceed to declare the subject Variance, 21-000610, null and void.

Sincerely,



ZENDO KERN
Planning Director

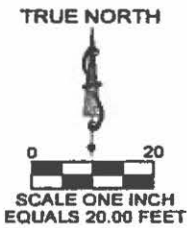
MMH:mmh

\\coh141v\planning\Staff\Marie\Originals\PD Letterhead\1-4-21 Marie PD Letterhead-Kern&Darrow.doc

Encl: Exhibits A - C

Cc: Real Property Tax Office (Kona)
Gilbert Bailado, GIS (via Email)

**MAP SHOWING EXISTING CONDITIONS UPON
LOT 34
of "HOONANI SUBDIVISION-INCREMENT "B""
Being a Portion of File Plan 1384 at Waimea, South Kohala,
County of Hawaii Island of Hawaii and State of Hawaii
TMK No. (3) 6-4-027:022**



**NOTE: BASIS OF AZIMUTH
DERIVED USING HEMISPHERE
GPS RTK SYSTEM**

**NOTE: ALL CORNERS ARE
FOUND IRON PIPES UNLESS
OTHERWISE NOTED**

**NOTE: ALL AZIMUTHS &
DISTANCES ARE SHOWN
& MAPPED HEREON IN A
CLOCKWISE DIRECTION**

**NAIL FOUND
Ref. "EAST BASE"
7,570.28 feet North
78.48 feet West**

**Building Encroaches
Over Setback 0.75'**

**Building Encroaches
Over Setback 0.56'**

NOTES:

- * 1) One boundary encroachments was found as shown & mapped hereon.
- * 2) Violations of County zoning set-back codes were found.
- 3) The distances shown between the property lines & the features, shown hereon, are based on selected found boundary monuments & acceptable tolerances for properties of this type.
- 4) The features, shown hereon, were located by an actual survey performed on the ground on October 27th, 2020.
- 5) See accompanying report pertaining to setbacks and encroachments.
- 6) CRM = Concrete, Rock & Masonry Wall

Setback Lines are shown from current data, but should be verified by builder. The description on this plat was provided to us by the client, and does not guarantee ownership, and should be compared to your Deed, Abstract or Certificate of Title. All building restrictions, building lines and easements may or may not be shown, check your Deed, Abstract, Title Report, and local ordinances, no responsibility is assumed by Surveyor. Compare all points before building by some and report any discrepancy at once. Dimensions are shown in feet and decimal parts thereof, no dimension is to be assumed by scaling.

DE MINIMIS NOTE:

ACT 131, (the de minimis law), amends Chapter 669 of the Hawaii Revised Statutes to allow certain legally constructed improvements not to be considered encroachments if they are over the lot line. In addition, the County of Hawaii has adopted Ordinance No. 02 79 on May 30, 2002, relating to the de minimis structure position discrepancy with regards to setbacks. This firm suggests that the parties involved discuss the findings of our survey with their real estate attorney(s) to ascertain if either of the the de minimis laws apply.

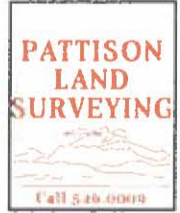
KIPAHOLE STREET
Rundatawa Address No. 64-5248
Edge of Asphalt

WATER METER(2)



**LEGEND
UTILITY BOXES**

	WATER METER
	CRM WALL
	CONCRETE

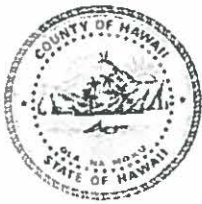


**LOT 31
10,057 Sq. Ft.**
I, Thomas G. Pattison, do hereby certify that this map is an accurate representation of a survey as made on the ground, by me, or under my direct supervision and that there are no apparent or visible encroachments or easements, known to me, except as shown and mapped hereon.

-COPY-

THOMAS G. PATTISON
November 7th, 2020
Hawaii License No. 10743

EXHIBIT A - Site Plan



BUILDING DIVISION – DPW

COUNTY OF HAWAII – 74-5044 Ane Keohokalole HWY. BLDG E 1st Floor KAILUA-KONA, HI 96740
Hilo Office (808) 961-8331 * Fax (808) 961-8410 Kona Office (808) 323-4720 * Fax (808) 327-3509

PLANNING DEPARTMENT

County of Hawaii
74-5044 Ane Keohokalole Hwy
Kailua-Kona, HI 96740

RECEIVED FEB 19 2021

Date of Notice: February 19, 2021

Owner: Brandon Clay Rodgers and Mellissa King Rodgers

Mailing address: 64-5256 Kipahele St. Waimea, HI. 96743

Address location of property: 64-5256 Kipahele St. Waimea, HI. 96743

SUBJECT: Variance – VAR-21-000610

Variance from Chapter 25, Zoning, Article 5, Division 7, Section 25-5-76 Minimum Yard Article 4, Division 4, Section 25-4-44(a) Permit Projections into Yards and Open Space Requirements (Encroachment into West Front Yard Setback and North and South Yard Setbacks)

T.M.K.: (3) 6-4-027:022 (Lot 34)

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

- No Building, Electrical and Plumbing 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: Records show all permits are complete.

Chris Domino – Building Plans Examiner
County of Hawaii Department of Public Works Building Division

BD-10

Exhibit B

Hong, Marie

From: orp@hawaiiantel.net
Sent: Sunday, February 07, 2021 2:01 PM
To: americandraftingand; eloisepung@gmail.com; Hong, Marie
Subject: First Notice Letter re: Brandon Rodger and Melissa Rogers

VIA EMAIL

Follow Up Flag: Follow up
Flag Status: Flagged

Good afternoon~

I received a letter of "First Notice" for a property at Hoonani Subdivision.

When reading the letter it appears that the owners are asking to get an approval for the the Variance.

If the home is not in the right position, and is not meeting the correct easements, then it should be corrected. I don't think it is fair for one party to be in non-compliance when the rest of the homeowners needed to abide by the rules when building their homes.

Does this process say to others, that anyone who is out of compliance is able to write a letter to the planning

department and the surrounding neighbors to get approval?

Please advise.

Best Regards,

Eloise Pung

970 Kalaniana'ole Ave.

Hilo, Hawaii. 96720

1 Exhibit C

