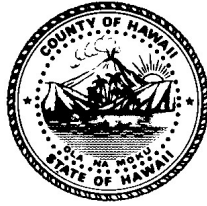


Mitchell D. Roth  
Mayor

Lee E. Lord  
Managing Director

West Hawai'i Office  
74-5044 Ane Keohokalole 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

October 9, 2023

Joan E. Fagerness  
P.O. Box 29  
Kurtistown, HI 96760 0029

e-mail: [jefag58@hotmail.com](mailto:jefag58@hotmail.com)

Dear Mr. Fagerness:

**SUBJECT: Application: Zoning Variance | PL-ZVAR-2023-000048**  
**Applicant: JOAN E. FAGERNESS**  
**Owner: JOAN E. FAGERNESS**  
**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 Front (North  
and West Yard Setback)**  
**Tax Map Key: (3) 1-7-014:015 (Lot 32)**

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The Planning Director certifies the **approval** of Variance – PL-ZVR-2023-000048, subject to variance conditions. The variance will allow a portion of the single-family dwelling to remain with a minimum 12.54 feet front (north) yard setback and associated roof eave projection to remain with an 8.33 front (north) yard open space. It also allows for the detached garage to remain with a minimum 11.17 feet front (west) yard setback and associated roof eave projection of 6.73 to remain with a minimum front yard open space. These exceptions are in lieu of the required 25-foot front yard setback and the 19-foot side yard open space requirement 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 40,952 square feet and is in the Happy Homes Subdivision, situated in Kea'au, Puna, Hawai'i. The subject property's street address 17-347 Momona Street.
2. **County Zoning.** Residential and Agricultural – 1/2 acre (RA-.5a).

3. **State Land Use Designation.** Rural
4. **Required Setback.** 25 feet for front and rear; 15 feet for sides.
5. **Variance Application.** The applicant/owner submitted the variance application, attachments, filing fee, and associated materials on August 12, 2023. The variance application site map was prepared by The Independent Hawaii Surveyors, LLC. **(See Exhibit A-Site Plan)**

The survey map shows the following setbacks:

- a. The encroachment leaves the single-family dwelling with a minimum front (north) yard setback of 12.54 feet and associated roof eave projection of 8.33 feet front (north) yard open space in lieu of the minimum 25-foot front yard setback and 19-foot front yard open space requirement.
- b. The encroachment leaves the detached garage to with a minimum 11.17 feet front (north) yard setback and associated roof eave projection in lieu of the required 25-foot side yard setback requirement and 19-foot open space requirement.

The survey map shows the following encroachment:

- a. The single-family dwelling encroaches 12.46 feet into the 25-foot front (north) yard setback and associated roof eave encroaches 10.67 feet into the 19-foot front (west) yard open space.
  - b. The detached garage encroaches 13.89 feet into the 25-foot front (west) yard setback and associated roof encroaches 7.27 feet into the 14-foot front (west) yard open space.
6. **County Building Records.** Hawai'i County Real Property Tax office records indicate that the following building permits were issued.
    - a. Building Permit 891751 issued on August 22, 1989, for the construction of a single-family dwelling consisting of two (2) bedrooms, one (1) bath, living room, dining area and kitchen. Building Permit finalized on March 5, 1990.
    - b. Building Permit 891988 issued on September 20, 1989, to raise single-family dwelling and add a carport below. Building Permit finalized on March 5, 1990.
    - c. Building Permit 921776 issued on August 18, 1992, for enclosure of the bottom floor and add a two (2) car carport. Permit finalized on December 18, 1992.

**6. Agency Comments and Requirements.**

- a. State Department of Health (DOH) memorandum dated August 8, 2022: “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).
7. **Public Notice.** The applicant filed a transmittal letter with copies 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 September 9, 2023.
8. **Comments from Surrounding Property Owners or Public.** Objection letter received from Jack and Jane Furtado received on September 12, 2023. (See Exhibit B)

**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 25-foot (north) front yard setback and the encroachment of the detached garage into the 25-foot (west) front yard setback.

The owner/applicant has indicated that she was unaware of any encroachment issues on the subject parcel. She under the impression the Kua‘aina Road was a driveway, which would have required a 15-foot side yard setback in lieu to required 25-foot front yard setback. It should be noted that when the building permit (BP 891751) was issued for the construction of an efficiency dwelling the site plan specified a 25-foot front yard setback. Subsequently, in 1989 a building permit (BP 891988) was issued to raise the single-family dwelling and add a carport below, on that building permit site plan a 15-foot side yard setback was specified, which could have led to the confusion in setback requirements. Also, the portion of the single-family dwelling encroaching into the north front yard setback was constructed without a building permit, therefore, it is considered “as built” and a building permit needs to be

obtained through the Department of Public Works – Building Division rectify the unpermitted portion of the single-family dwelling.

In addition, he has also stated that the northern property boundary along Kua‘aina Road is planted with areca palms which provides a landscaping buffer from the roadway.

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 front yard setback of the subject property include the following actions:

One option would be to remove the portion of the single-family dwelling and the detached garage to meet setback requirements. Any structural or design correction to meet setback requirements would leave unattractive reconstruction scars.

Because the encroachment is within the front yard setback, consolidating the subject property with the roadway and re-subdivide the property to modify property lines, and adjusting minimum front yard setbacks are not viable options. Both alternatives are not practical. Therefore, there are no reasonable alternatives 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 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.

The encroachments are in the front yard setback adjacent to the roadway. Therefore, it should not obstruct or prevent adequate air circulation and exposure to light 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 built upon the subject property ("LOT 32") will not meet the minimum front 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), 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.
2. Should the single-family dwelling and the detached garage 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.
3. 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.
4. The owner/applicant shall secure a building permit to legitimize and unpermitted portion of the single-family dwelling and the detached garage within a year of this approved variance.
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.
6. The existing landscape planting and improvements shall remain to provide a buffer from the

Joan E. Fagerness  
PL-ZVAR-2023-000048  
Zoning Variance  
October 9, 2023  
Page 6

roadway (Kua‘aina Road). Landscaping plants shall be maintained in a manner conducive to their health and growth.

7. The applicant/owner(s) shall allow the Planning Department to conduct a site visit to determine if all zoning violations have been corrected.
8. The applicant/owner(s), their assigns or successors shall be responsible for complying with all stated conditions of approval.

Should any of the foregoing variance conditions not be complied with, the Planning Director may proceed to declare subject PL-ZVAR-2023-000048 null and void.

Sincerely,

*Zendo Kern*  
[Zendo Kern \(Oct 11, 2023 11:38 HST\)](#)  
ZENDO KERN  
Planning Director

LHN:so

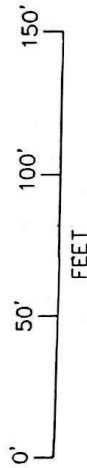
\\coh01\planning\public\Admin Permits Division\Variances From CoH02\Zone1\PL-ZVAR-2023-000048 TMK 170140150000 Fagerness.docx

Encl: Exhibit A & B

cc: Real Property Tax Office (Hilo)  
Alan Gunn, GIS (via email)  
Annalyn Seguban, Zoning Inspector (via e-mail)

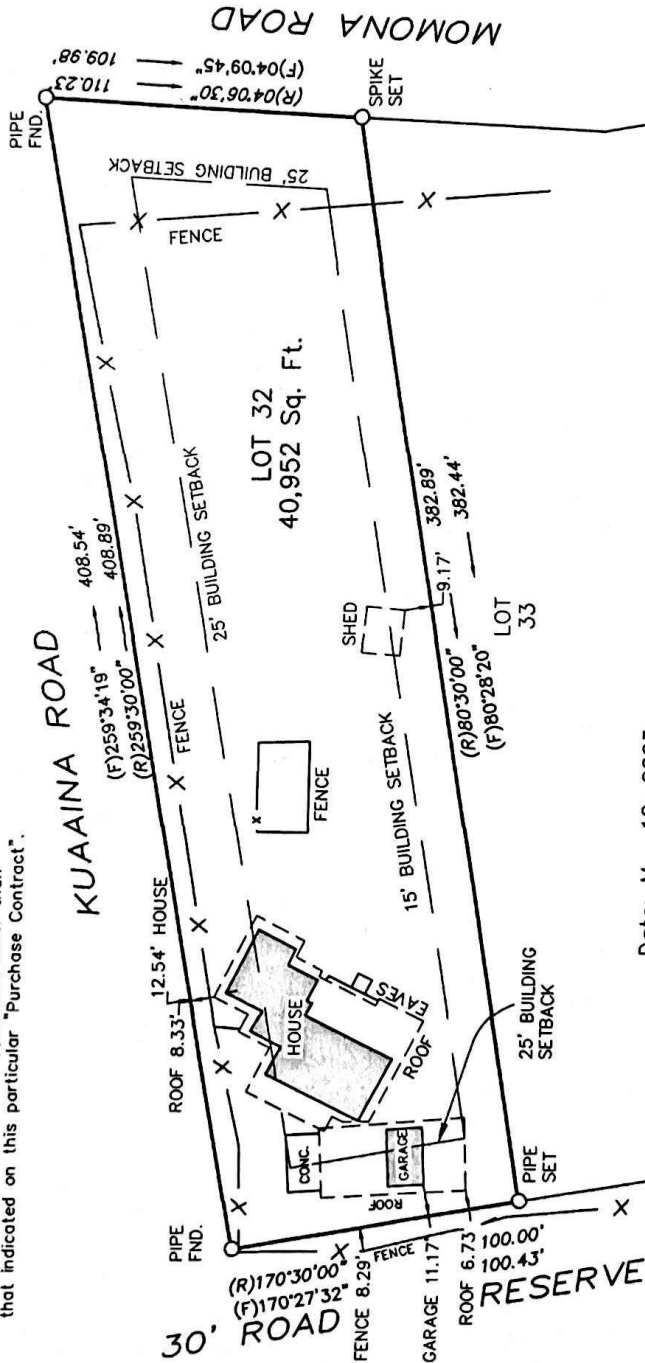
**EXISTING CONDITIONS UPON LOT 32**  
**"HAPPY HOMES SUBDIVISION"**

KEAAU, PUNA  
 ISLAND OF HAWAII



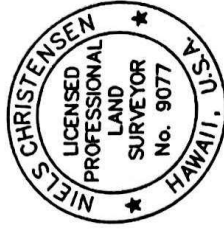
**NOTES:**

1. The features shown hereon were located by an actual field survey completed on April 19, 2023.
2. This map shows, "the location of any improvements in the vicinity of perimeter property lines" (Item K-2 of "Purchase Contract").
3. Field measured dimensions (F) are within acceptable tolerances as compared to record dimensions (R) for land of this type and in this subdivision.
4. The attached Report pertains to improvements near property lines and County building setbacks.
5. This map should not be changed, altered or used to execute any transaction or application other than that indicated on this particular "Purchase Contract".



Date: May 10, 2023  
 Drawing: JOB15733.dwg  
 TMK: (3) 1-7-14: 15

TRUE NORTH  
 SCALE: 1 IN. = 50 FT.



This work was prepared by me or under my direct supervision

*Niels Christensen*

Niels Christensen  
 Licensed Professional Land Surveyor  
 License Number 9077

**The Independent Hawaii Surveyors, LLC**  
 P.O. BOX 577  
 Hilo, HI 96721  
 Phone 808 959-0360  
 FAX 808 959-0353  
 info@hawaiiboundary.com

18°36'02.5"N, 155°04'18.0"W COUNTY GIS

EXHIBIT B

COH PLANNING DEPT  
SEP 12 2023 PM 3:25  
REC'D HAND DELIVERED

Jack and Jane Furtado  
P O Box 335  
Pepeekeo, HI 96783

9/12/23

Hawaii County Planning Department  
101 Pauahi St., #3  
Hilo, HI 96720

Re: Joan Fagerness Request for Variance to Building Set Back Requirements  
TMK: 170140150000

Dear Planning Director:

Thank you for allowing us to comment on the request for variance. Please note that the letter mailed to us was mailed per the postmark on 9/9/23 to our post office box. Mail was picked up yesterday, 9/11/23. The letter stated that the deadline to submit comment was 9/11/23. So we appreciate the opportunity to comment.

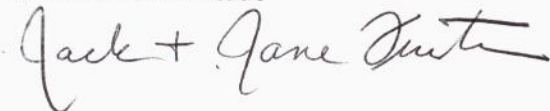
While we can appreciate this request for variance regarding set back requirements for Ms. Fagerness' home, the issue we believe is that Ms. Fagerness' wall, which assumes her property boundary, is actually sitting on the paper roadway, Kua'aina Rd. The property at TMK: 170150110000, belonging to the Longstaff's, boundary extends across the existing roadway, almost to Ms. Fagerness' wall. It is our belief that Ms. Fagerness' wall and house were built on the roadway easement to the mauka Kua'aina Rd. properties. Attaching the county map which identifies Kua'aina Rd as being between the Longstaff property and the Fagerness property. This map also shows buildings on Ms. Fagerness' property as being outside of the boundaries of the property.

We have been harassed over and over by the Longstaff's and Ms. Fagerness about our access to our Kua'aina Rd. property, since the existing road is on the Longstaff's property. The Longstaff's are trying to bar us from using the existing roadway. Our property is TMK: 170150320000.

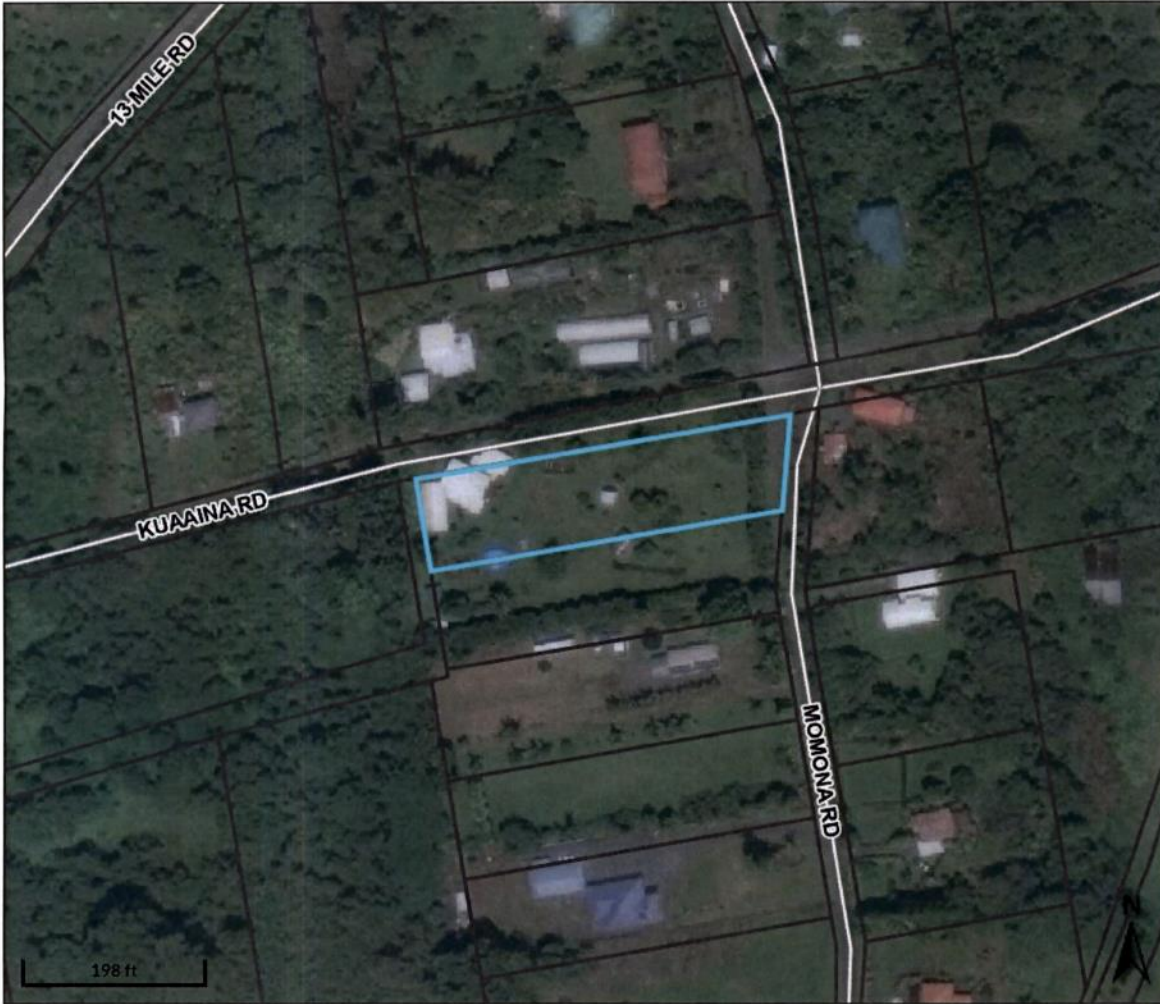
Even if you grant the variance request, the actual boundary in question may be another 30 feet towards the house. I am not aware if Ms. Fagerness has had her property surveyed. Perhaps a survey would be in order to determine actual boundaries of Ms. Fagerness property.

Thank you for your time and consideration.

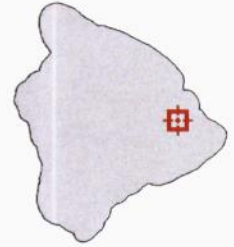
Jack and Jane Furtado







Overview



Legend

Parcels

| Parcel ID    | Situs/Physical Address                                       | Market Land Value          | \$53,200  | Last 2 Sales Date | Price | Reason                              | Qual |
|--------------|--|----------------------------|-----------|-------------------|-------|-------------------------------------|------|
| 170140150000 | FAGERNESS, JOAN ELIZABETH PO BOX 29 KURTISTOWN HI 96760 0029 | Dedicated Use Value        | \$0       | 4/1/2019          | 0     | RELATED INDIVIDUALS OR CORPORATIONS | U    |
| 0.94         |  | Land Value                 | \$0       | 3/23/2000         | 0     | RELATED INDIVIDUALS OR CORPORATIONS | U    |
| HOMEOWNER    |  | Exemption                  |           |                   |       |                                     |      |
|              |  | Net Taxable Land Value     | \$20,900  |                   |       |                                     |      |
|              |  | Assessed Building Value    | \$188,300 |                   |       |                                     |      |
|              |  | Building Value             | \$176,800 |                   |       |                                     |      |
|              |  | Exemption                  |           |                   |       |                                     |      |
|              |  | Net Taxable Building Value | \$11,500  |                   |       |                                     |      |
|              |  | Total Taxable Value        | \$303,500 |                   |       |                                     |      |

**Brief Tax Description** LOT 32 40,952 SF DES POR RP 7223 LCAW 8559-B:16 SUBJ/ ESMT "A"

(Note: Not to be used on legal documents)

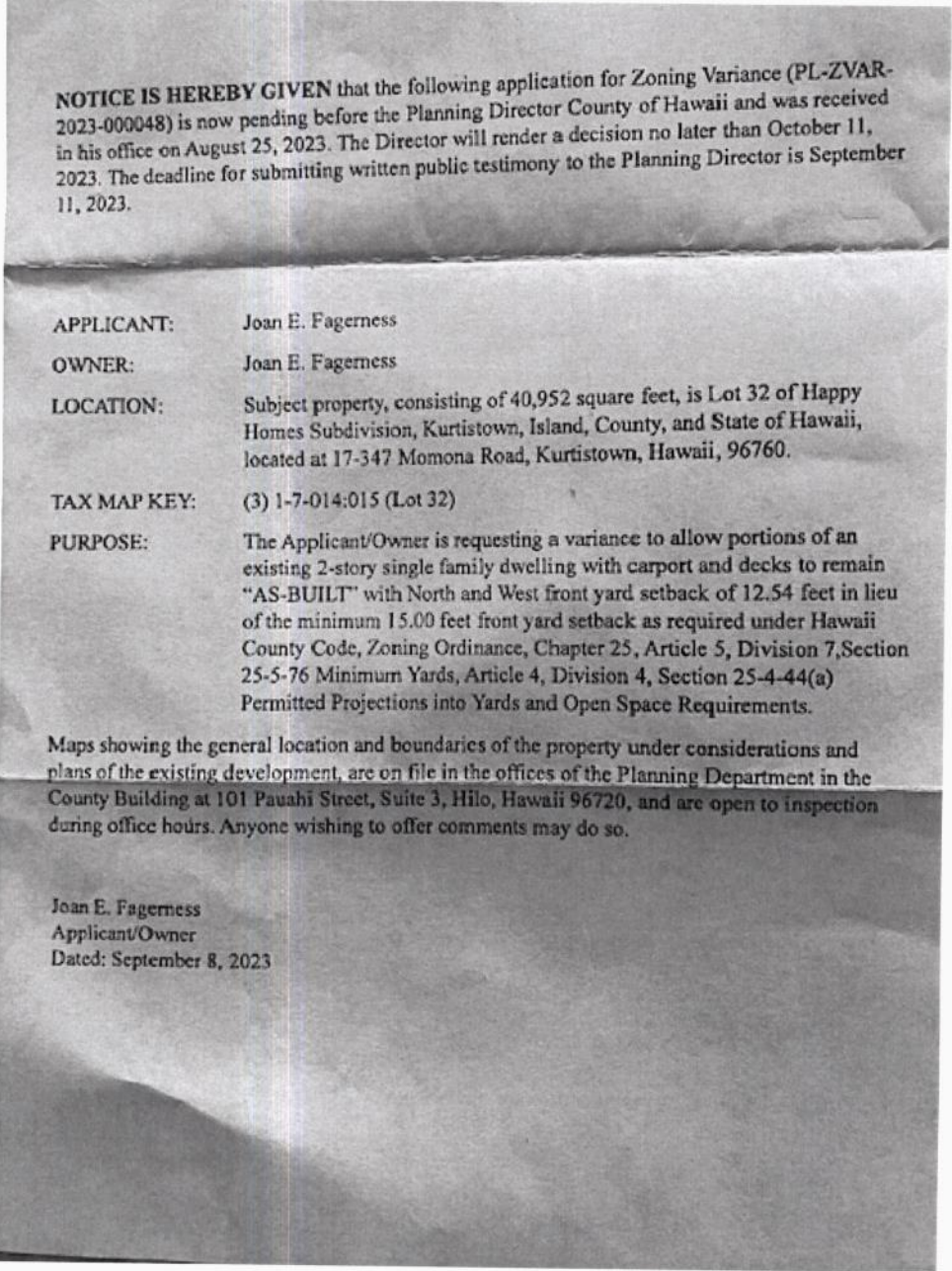
\*Hawaii County makes every effort to produce the most accurate information possible. No warranties, expressed or implied, are provided for the data herein, its use or interpretation. The assessment information is from the last certified taxroll. All data is subject to change before the next certified taxroll. The 'parcels' layer is intended to be used for visual purposes only and should not be used for boundary interpretations or other spatial analysis beyond the limitations of the data. The 'parcels' data layer does not contain metes and bounds described accuracy therefore, please use caution when viewing this data. Overlaying this layer with other data layers that may not have used this layer as a base may not produce precise results. GPS and imagery data will not overlay exactly.

**Jane Furtado**

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**From:** Jane [REDACTED]  
**Sent:** Tuesday, September 12, 2023 2:59 PM  
**To:** Jane Furtado  
**Subject:** Variance

Caution: This email came from outside HHSC.



Sent from my iPhone

Envelopes  
PO Box 335  
Peperkee HI  
96783

Hawaii County Planning Dept  
Attn: Planning Director  
101 Peperkee, #3  
Hilo HI 96720

PL-ZVAR 2023-000048