

CERTIFIED MAIL

October 5, 1987

Mr. Colin L. Love
Attorney at Law
77-6400 Nalani Street
Kailua-Kona, HI 96740

Dear Mr. Love:

Variance Application (V87-43)
Side and rear yard setback
Tax Map Key 7-5-29:61

After reviewing your application and the information submitted in behalf of it, the Planning Director by this letter hereby certifies the approval of your variance request to allow an existing single family dwelling to remain with a side yard setback of 3.80 feet and a clearspace of .42 feet in lieu of the minimum 8 feet and 4 feet clearspace requirement and a 13.02 feet rear yard setback in lieu of the minimum 15 feet requirement within the Unplanned zoned district.

The approval is based on the following:

SPECIAL AND UNUSUAL CIRCUMSTANCES

There are special and unusual circumstances applying to the subject property which deprive the petitioner of substantial property rights that would otherwise be available, or which interfere with the best use or manner of development of the property.

The error in siting the structure appears inadvertent, as the adjacent owner to the north utilized the same boundary line in building his house. The general contractor who is responsible for siting the structure has long since moved away from Hawaii and cannot be located. Furthermore, it is the

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current owner who is attempting to reconcile this error and who revealed the discrepancy. This development intended to comply with the minimum setback regulation as indicated by the building permit description of 8 feet to the nearest interior lot boundary. There is no indication that the contractor notified the Department of Public Works, Building Division, at the start of construction as is required; consequently, only a final inspection of the structure was made, and no irregularities were noted on the building permit.

However, the County's Housing Code, which is separate from the Zoning Code, has building setback standards which will need a separate variance from the Board of Appeals in order to legitimize this dwelling with regard to setback. A condition is therefore imposed requiring this action by the applicant.

ALTERNATIVES

In order to achieve compliance with the Zoning Code concerning the side and rear yard setbacks which are currently non-conforming, either the approval of a variance request or the moving of the structure to the appropriate location to meet the setbacks; or acquiring additional property adjacent to the respective setback location would be required.

The applicant states that acquisition of land is not possible as the adjacent landowners do not wish to sell. Also, this subdivision's lots are all non-conforming as to size, and increasing one lot would decrease the other which would not be an appropriate recourse. And in fact, one consequence of the new survey is that the applicant must remove a 1 foot slice of curved driveway about 20 feet long which protrudes into the adjacent property. The physical moving of the house whether a few inches or a dozen feet would present an enormous engineering and reconstruction/replacement task which is considered an unreasonable alternative to require of the applicant. Approval of the variance is considered the only reasonable alternative available to this situation, which is given added weight by the fact that the adjacent property owners have not objected to this request for a variance. (It may well be that the other owners might find themselves to have relied on the misplaced survey pins and may find themselves in a similar situation.)

INTENT AND PURPOSE

The intent and purpose of the setback requirement is to ensure that light, air, physical and visual circulatory functions are available between a dwelling and its property

lines, and to the adjacent properties as well. In this case, the dependence of the original homeowner on the general contractor to accurately site the dwelling resulted in the error now being addressed. But the diminished side yard setback of the applicant's dwelling has also resulted in an increased side yard setback for the north/adjacent building; and consequently, the Code-required amount of space exists between the two buildings, irrespective of the misaligned boundary. This element is coupled with the fact that the adjacent neighbor (although they are not willing to sell or exchange the required amount of land to the applicant) does not protest the variance request. Together, the existing amount of space is a fact and the purpose of the setback is attained. In fact the two dwellings are approximately 36 ft. apart.

Based on the foregoing findings, the variance request would be consistent with the general purpose of the zoning district; the intent and purpose of the Zoning Code; the County General Plan; and will not be materially detrimental to the public's welfare or cause substantial adverse impact to the area's character and adjoining properties.

The variance request is approved, subject to the following conditions:

1. The petitioner, its assign or successor, shall be responsible for complying with all stated conditions of approval.
2. No further construction shall be permitted within the north side yard and rear yard which are the subject of this variance action unless said construction conforms with the standard setback requirements in this case 15 ft. front and rear, 8 ft. sides, of the zoning code.
3. Any repair of any portion of this building which is affected by this variance shall be limited to only the extent permitted under section 25-79(b) of the zoning code.
4. Any rainwater runoff from this property shall be disposed of on the applicant's own property and prevented from flowing onto any adjacent properties.
5. The petitioner shall apply for a variance from the Housing Code's building setback requirements through the Board of Appeals.

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6. All other applicable State and County rules and regulations shall be complied with.

Should any of the foregoing conditions not be met, this variance request shall be deemed null and void.

If you have any questions on this matter, please feel free to contact us.

Sincerely,



ALBERT LONO LYMAN
Planning Director

DT:dh