

CERTIFIED MAIL

March 12, 1991

Mr. Jack Mallory
73-1379 Melemele Street
Kailua-Kona, HI 96740

Dear Mr. Mallory:

Variance Application (V90-20)
Variance from Minimum Side Yard Setbacks
Tax Map Key: 7-3-47:97

lm3/14

We regret to inform you that after reviewing your application and the information presented in its behalf, the Planning Director is hereby denying your variance request. The reasons for the denial are as follows:

SPECIAL AND UNUSUAL CIRCUMSTANCES

There are no special and unusual circumstances applying to the subject real 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 land comprising this home site is 43,767 square feet in area which affords ample space for the placement of a dwelling and still readily accommodates the building setback requirements of the Zoning Code. Its shape is a 3 to 5 proportion rectangular corner lot. The dwelling, according to the site plan, is about 4,000 square feet in area not including the garage and lanais. There are no topographic or geographic features which would impede compliance with the Zoning Code. This lot is typical of the entire subdivision of 118 one-acre lots.

The unusual circumstance described by the applicant is that the approval of the project itself creates special and unusual circumstances due to the fact that "so many people had a chance to

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notice the misplacement, and did not." This reason does not meet the criteria for a variance. Specifically, the Zoning Code states that, among other things, "No variance may be granted unless it is found that there are special and unusual circumstances applying to the real property which exist either to a degree which deprives the owner of substantial property rights that would otherwise be available, or which interfere with the best use or manner of development of the property." [Emphasis added.]

Instead, it is found that the encroachment was caused solely by the owner and was not accidental nor attributable to the land (real property). Furthermore, in the case of an owner-builder, the responsibility cannot be shifted to another person. The building site plan indicated the dwelling placement and distance from the property lines. The appropriate minimum setback requirements were stamped on this plan by the Planning Department.

ALTERNATIVES

There are reasonable alternatives which the applicant has not pursued. The applicant states "a consolidation and resubdivision of lots 14, 15, 16 could solve the setback problem. . .however, the adjoining owners may prefer to live with a variance rather than change the shape of their lots."

By letter of July 27, 1990, the owners of affected adjacent parcel 16 to the north, Connie and Terry Barlup, state "In early 1988 I confronted Mr. Mallory trying to work out an amicable exchange of property, moving present boundary lines. . .Mr. Mallory had full knowledge of this encroachment but did not want to make a settlement..."

Owner of affected adjacent parcel 14 to the east, Tsing Y. Cannon, says she has not been approached by Mr. Mallory on the subject.

Both adjacent property owners object to the granting of the variance. Based on both owners, the encroachment problem could be resolved by pursuing a consolidation and resubdivision of their properties and the subject property.

It should be noted that the variance procedure is generally intended to be the procedure of last resort. The applicant is, instead, utilizing it as the first.

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INTENT AND PURPOSE

The intent and purpose of the setback requirement is to afford light, air, open space and related spatial considerations between a dwelling and adjacent properties or structures in a scale appropriate to the district. In this case, 1-acre lots in a 1-acre zone have been characterized by minimum 30 feet front and rear yards and 20 feet side yards for the past 28 years and are known and expected to be such in this area. The Building Permit for the structure also stipulated the minimum setback requirements. In the current case, this was not done, and two side yards are instead at a minimum of 12.8 and 14 feet instead of the required 20 feet.

Based on the above, the granting of this variance request will not be consistent with the general purpose of the zoning district, the intent and purpose of the Zoning and Subdivision Codes, and the County General Plan and will cause substantial adverse impacts to adjoining properties and the area's character.

Therefore, given the above findings, the Director has concluded that this variance request should be denied. The applicant shall commence with the correcting of this setback violation within six (6) months of receipt of this letter by one of the following alternatives:

1. Remove that portions of the structure which encroaches within the side yard setbacks as to comply with the minimum 20-foot requirement, or
2. Pursue a consolidation and resubdivision action with the adjoining properties.

The Director's decision is final, except that within thirty (30) days after receipt of this letter, you may appeal the decision in writing to the Planning Commission in accordance with the following procedures:

1. Non-refundable filing fee of one hundred dollars (\$100); and
2. Ten (10) copies of a statement of the specific grounds for the appeal.

Should you decide to appeal, the Planning Commission shall conduct a public hearing within a period of ninety days from the

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date of receipt of a properly filed appeal. Within sixty days after the close of the public hearing or within such longer period as may be agreed to by the appellant, the Planning Commission shall affirm, modify or reverse the Director's action. A decision to affirm, modify or reverse the Director's action shall require a majority vote of the total membership of the Planning Commission. A decision to defer action on the appeal shall require a majority vote of the Planning Commission members present at the time of the motion for deferral. If the Planning Commission fails to render a decision to affirm, modify, or reverse the Director's action within the prescribed period, the Director's action shall be considered as having been affirmed.

All actions of the Planning Commission are final except that, within thirty days after notice of action, the applicant or an interested party as defined in Section 25-27.2 of this article in the proceeding before the Planning Commission may appeal such action to the Board of Appeals in accordance with its rules.

All actions to the Board of Appeals are final except that they are appealable to the Third Circuit Court in accordance with Chapter 91 of the Hawaii Revised Statutes.

Should you have any questions, please feel free to contact us.

Sincerely,



NORMAN K. HAYASHI
Planning Director

AK:mra
0790D
Enclosure: Background Report

cc/encl: Planning Commission
Mr. Donald McIntosh
Joseph and Katherine Augustine
Michael and Sandra Brady
Ms. Tsing Cannon
West-Hawaii Office