

V457

CERTIFIED MAIL

November 6, 1991

Mr. and Mrs. Jackson Gilliam  
P.O. Box 6502  
Captain Cook, HI 96704

Dear Mr. and Mrs. Gilliam:

Variance Application (V91-8)  
Applicant: Jackson Gilliam  
Tax Map Key: 9-2-87:53

After reviewing your application and the information submitted on behalf of it, the Planning Director by this letter hereby certifies the approval of your variance request to permit an existing building constructed with an expired building permit to remain as is with a bay (alcove) window projecting 7 inches into the required side setback distance of 20 feet for a 1-acre parcel in an A-la zoned district. The subject property is located on the east side of Kamehameha Boulevard in the middle of and between Donala and Moana Drives in the Hawaiian Ocean View Estates Subdivision, Kahuku, Kau, TMK 9-2-87:53.

The approval is based on the following:

SPECIAL AND UNUSUAL CIRCUMSTANCES

According to the applicant, the encroachments were built by the adjacent lot owner, William Morgan, who recently sold the property to the Gilliams. The buyer purchased the buildings and lot directly from the seller and without knowing of the transgressions. When the violations became known, the applicant began litigation against the seller to correct the situation caused by the projecting wooden deck which extends to within 2 feet of the boundary. Being attached to the dwelling, it is supposed to end 14 feet from the side boundary.

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Mr. and Mrs. Jackson Gilliam  
November 6, 1991  
Page 2

The applicant is not specifically requesting a variance to permit the deck to remain; that is under litigation, and he requests that it be permitted to remain, as evidence, until the matter is legally settled. The issue they present is the protruding bay windows which extend, as part of the main building, 7 inches into the building setback distance. The required distance is 20 feet, but this segment of wall has 19'5" of sideyard instead.

The hardship involved is that the violations are not caused by the applicant but rather the seller who did not disclose the infractions. Bringing the wooden deck up to code requirements would be a larger item which should be the seller's responsibility. The situation is the same for the 7-inch protrusion of the bay window except for the scope and severity. The infraction is so slight in the bay window's situation, and the effect on surrounding properties would be nil inasmuch as the land is vacant and the most affected property owner is also the person who committed the violation, and his property is vacant.

These are considered special and unusual circumstances concerning the realty affecting the owner but not caused by him.

#### ALTERNATIVES

Since adjacent Parcel 52 is of adequate size, vacant and is owned by the seller and builder of the property containing the nonconforming deck and bay window (among other violations), there is available land for the applicant to exchange, thereby extending the applicant's side boundary to meet the side setback requirement.

The two encroaching portions of the building can also be removed although they could be a costlier remedy.

The exact resolvment method for the wooden deck is not yet known because, as stated by the applicant, litigation is in process.

But the variance to permit the slightly protruding bay window to remain as a 7-inch encroachment is considered a reasonable alternative to grant in this A-la zone where the adjacent lots are all vacant and where no objections were received from surrounding property owners or the general public.

The resolvment of the deck encroachment through land acquisition or exchange or through building alteration is held in abeyance temporarily, as indicated in the conditions of approval.

Mr. and Mrs. Jackson Gilliam  
November 6, 1991  
Page 3

However, the wood deck violation should not remain indefinitely, and with the seller being an absentee owner often (according to the applicant's attorney), there is not adequate assurance that the litigation process would have a timely ending. The issue could well be "in process" for years and then forgotten or ignored.

There are alternatives to keeping the deck in place for an indefinite period of time. For example, detailed and dated photographs, attested to by statements from various persons (such as a building inspector, contractor, realtor, etc.) could well document its existence and location should the physical correcting of the violation occur. It is not necessary to have the deck remain in its complete violative state without corrective action if the litigation process exceeds a specified time.

The time allowed for correcting the situation should not be open ended or unlimited as the request would have it. Therefore, a time limited for its resolvment is levied as a condition of approval of this request.

#### INTENT AND PURPOSE

The intent and purpose of the setback requirements are to provide adjacent property owners with adequate air, light, open space, circulation and related spacial considerations between their property and buildings in a scale commensurate with the community's expectations.

In this case, the 7-inch differential between conforming and not conforming with the 20-foot sideyard is considered to be of such minor impact that it is virtually indiscernible to any observer and adjacent property owner. Coupled with the fact that this is an agriculture 1 acre zone, the adjacent properties are vacant (have been for over 20 years) and the area is very sparsely settled and is definitely rural, the request by the applicant, who did not contribute to the error, is hereby granted.

In the case of the nonconforming deck which is but 2 feet from the side boundary, that issue will be held in temporary abeyance while the matter is being litigated, and is referred to in the conditions set forth for this variance permit. While the deck may not be readily apparent or even visible to the neighborhood, it is a fact that it was built without a building permit and is violative of the Zoning Code and, thus, cannot be condoned.

Mr. and Mrs. Jackson Gilliam  
November 6, 1991  
Page 4

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 and the County General Plan; will not be materially detrimental to the public's welfare; and will not cause substantial adverse impact to the area's character and adjoining properties.

The variance request is approved subject to the following conditions:

1. The applicant, his assigns or successors shall be responsible for complying with all stated conditions of approval.
2. Construction within the 20-foot sideyards shall be limited to the 7-inch projecting bay window for which this variance permit was requested. All other construction shall meet the requirements of the Zoning Code.
3. The existing nonconforming wooden outdoor deck for which no building permit was issued, shall be modified or removed to comply with Zoning Code requirements within six (6) months of receipt of this variance permit. The remedial action may include obtaining the additional requisite amount of land to the west.
4. Building permits for all other structures on the property shall be applied for within three (3) months of receipt of this variance permit unless they have been issued in the interim.
5. Submit a written report to the Planning Director detailing the status of compliance with Condition Nos. 3 and 4 by the end of every three (3) month period from receipt of this variance permit.
6. All other applicable State and County rules and regulations shall be complied with.
7. Should any of the foregoing conditions not be met, the Director may proceed to declare the variance null and void.

Mr. and Mrs. Jackson Gilliam  
November 6, 1991  
Page 5

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

Sincerely,  
  
NORMAN K. HAYASHI  
Planning Director

DT:syw

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cc: DPW/Building Division  
West Hawaii Office  
TMK File