

VAR 540

October 26, 1993

CERTIFIED MAIL

Mr. Victor Schneider  
76-214 Royal Poinciana  
Kailua-Kona, HI 96740

Dear Mr. Schneider:

Variance Application WH (VAR 93-22)  
Building Encroachment  
Tax Map Key: 7-6-24: 2

Having reviewed the application and related information, the Director has concluded that the variance application to allow the lanai to remain, should be denied as there are no special and unusual circumstances applying to the land which deprive the petitioner of substantial property rights that would otherwise be available or which obviously interfere with the best use or manner of development of the property.

In this determination full consideration was given to the Board of Appeals affirmative variance decision and "Conclusion of Law" dated 13th of August 1993, however additional public comments on affected surrounding residences was not available at the hearings. In addition, approval of the Board of Appeals on the housing code violation is not a de-facto approval of the zoning code violation.

The dwelling was built in 1983 as an ohana duplex in an RS-10 zone with a 10 foot rearyard setback as opposed to the required 20 feet. The installation of an 8 feet lanai without permit further encroached into the setback requirements which initially was in violation of the zoning code.

In addition, Article 25, "Regulations for Ohana Dwellings," Section 25-273 states. "No variance from applicable requirements of this chapter, including yard setbacks, shall be granted to permit the construction of an ohana dwelling."

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The applicable contention that "privacy" from surrounding homes overlooking the living room and bedroom is not considered sufficient grounds to justify as a special or unusual circumstances, a required criteria for justification of a variance.

There were reasonable alternatives to placing the lanai at the south end of the building where the actual building setback area is the least (10 feet). The north east and west have respectively 33 feet, the sides have 33 feet and 20 feet. Applying for a building permit would have resulted in the applicant being advised of this. By his own actions, the applicant has ignored reasonable alternatives.

Although there are letters of support from neighbors, the most affected owners, the ones adjacent to the applicant's building encroachment, object to the granting of the variance. They also contend that all building additions need community association consent, according to the deed covenants and restrictions, and that the applicant has not complied with this requirement. However, it is not the County's responsibility to impose nor enforce these types of restrictions.

As a consequence of this denial, the applicant shall remove the encroaching lanai, including but not limited to the latticework, roof and posts. The 8 feet concrete slab may remain. The 10 feet rear yard for the dwelling is granted, permitting the existing dwelling (but not the lanai) to remain as is. No further improvements shall be permitted within the 20 feet rear yard (including any portions of the interior of the dwelling which encroach). The removal of the aforementioned structure (lanai) shall be completed within 6 months of receipt of this denial. The applicant shall furthermore submit a letter every 3 months from this date describing the progress and status of the removal.

The Director's decision is final, except that within thirty 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 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

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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 of 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 this office at 961-8288.

Sincerely,



VIRGINIA GOLDSTEIN  
Planning Director

NO:mjh  
1347D

xc: West Hawaii Office