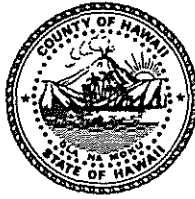


Stephen K. Yamashiro  
Mayor



Virginia Goldstein  
Director

Norman Olesen  
Deputy Director

## County of Hawaii

### PLANNING DEPARTMENT

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CERTIFIED MAIL  
Z 416 229 154

August 2, 1995

Mr. & Mrs. Jack & Lona Kauai  
P.O. Box 394  
Volcano, HI 96785

Dear Mr. & Mrs. Kauai:

Variance No. 672 (VAR 95-31)  
Applicant: Jack & Lona Kauai  
Variance from Minimum Requirements of  
the SIDE YARD SETBACK & SIDE YARD CLEARSPACE  
Tax Map Key: 1-9-11:40, Lot 165

After reviewing the complete application, the Planning Director's action, unfortunately, is to DENY the requested variance but to approve a variance for the dwelling wall line.

Requested Variance - Denied. The variance request is DENIED for an existing open lanai with a 1.5 foot clearspace from parcel 40's south easterly side property line; the MINIMUM 4.0 FOOT CLEARSPACE SETBACK is required to be complied with; and, the variance request is DENIED for the tool storage (wall line) addition with a side yard of 1.5 feet from the south easterly side property; the 8.0 FEET SIDE YARD SETBACK is required to be complied with. The required minimum yard and clearspace setbacks are in accordance with Zoning Code Secs. 25-66(a), 25-125(b), and 25-124(a)(1).

The denial of the variance request by the Planning Director is based on the following findings.

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SPECIAL AND UNUSUAL CIRCUMSTANCES

1. Location Description. Parcel 40 is located at 19-4304 Alanui Iiwi Road, por. Anuheha Volcano House Lots, Olaa, Puna, Hawaii, TMK: 1-9-11:40, Lot 165. The lot area is 9,375 sq. ft. The county zoning is Single Family Residential (RS-10); the State Land Use designation is "Urban".
2. Dwelling Building Permit. On parcel 40 there exists one single family dwelling (Building Permit No. 902874 (closed: 4/19/91); the former landowner listed on the building permit is a Philip Harrison.
3. Submitted Building Plans. In 1991 building plans for the dwelling and in 1994 building plans for the illegal lanai - storage addition were submitted to the Planning Department as well as the Department of Public Works - Building Division for building permit approval. County approval of these plans would have been contingent upon a site plan representing compliance with all minimum setbacks required of the illegal lanai - storage construction as well as the dwelling wall line. Based on the submitted plans of the permit applicant, the dwelling and the illegal lanai - storage addition received all necessary approvals from the applicable County departments.
4. Time Factor. It has been approximately five years since the construction of the existing dwelling was approved by the County; and, approximately not less than ten months since the permit for the illegal lanai addition was issued to the Kauis.
5. Dwelling Wall Line Encroachment. From the submitted drawn-to-scale site plan, the dwelling wall line is shown to encroach into the northern side yard setback by approximately two feet, more or less. The encroachment appears to be an error in the construction staking and siting of the dwelling on parcel 40. A review of the record on this lot did not find evidence to indicate otherwise. According to building permit records and the Kauis, the dwelling was constructed under a permit taken out by the former landowner; and, the dwelling appears to have been completed when the Kauis purchased parcel 40. Consequently, the dwelling was acquired as-built. The Kauis purchased parcel 40 as-is without a survey map prepared by a registered professional land surveyor. For the dwelling wall line encroachment, the applicant is trying to correct and resolve a situation which they had no control over. To this end and in good faith, the applicant submitted a drawn-to-scale site plan providing disclosure and admission of the dwelling wall line encroachment.

At the time of purchase the applicant would have no reason and did not have the means to conclude that the structure did not meet county setback requirements.

6. Building Permit for Illegal Lanai - Storage Addition. According to comments received from the County Department of Public Works - Building Division, the existing lanai enclosed by lattice was built without a legal building permit. An after-the-fact building permit for the illegal lanai - storage construction was obtained by the applicant and current landowner, the Kauis, under BP 941254 (opened: 9/1/94).

The DPW - Building Division recommended that the Housing Code setback of five feet be maintained for safety and health reasons. The Housing Code setback requirement of the lanai - storage is five feet because these are accessory to the residence. The storage could be an M occupancy unit and be setback only three feet from the side property line; however, a one hour fire separation would then be required between the storage and the rest of the residence.

7. Inconsistent Site Plans - Illegal Lanai Addition. To legalize the illegal lanai- storage construction, the Kauis were required to submit after-the-fact plans to the DPW - Building Division and the Planning Department for building permit approval. The site plan submitted by the Kauis for BP 941254 represented compliance with all setback and clearspace side yard requirements of the approved permit.

In contrast, however, the site plan submitted for the requested variance diametrically contradicts the site plan approved for the building permit. The variance request site plan (received 4/19/95) is inconsistent with the building permit site plan issued for the illegal lanai - storage construction (BP opened 9/1/94). The BP for the illegal construction was issued approximately eight months before the variance application was made by the Kauis.

8. Submitted Site Plan for Variance Request. For the purpose of the variance request, a drawn-to-scale site plan was submitted by the Kauis that illustrate the side yard setback and clearspace encroachment.

Three Areas of Encroachment: Dwelling Wall Line Encroachment. Along the existing dwelling wall line there is an approximate two feet encroachment of the side yard setback, more or less; and, this results in an approximate six feet setback from the south easterly side property line, more or less. Encroachment of Storage Addition Wall Line. Secondly, at the storage wall line there is a setback encroachment of approximately 6.5 feet, more or less; consequently, this results in an approximate, yard setback of only 1.5 feet from the south easterly side property line, more or less. Encroachment of Open Clearspace.

Thirdly, along the length of the lattice enclosed lanai there is a clearspace encroachment of approximately, 6.5 feet, more or less; and, this results in an approximate, clearspace of only 1.5 feet, more or less, from the south easterly side property line along the length of the enclosed lanai.

9. General Site Conditions. Parcel 40 is a 9,375 square feet lot, 75 feet wide and 120 feet in length with a rectangular shape. The 9,375 square feet lot area meets the minimum building site area of a RS zone district, or not less than 7,500 square feet; and, the parcel's 75 feet width also meets the minimum building site average width of 60 feet. The topography or ground conditions of parcel 40 is generally level at the areas in question, the south easterly side yard as well as the front yard. The side yard setback and clearspace encroachments can be corrected to comply with the minimum yard setback and clearspace requirements. Moving the existing dwelling would be prohibitive.

Dwelling Wall Line Encroachment. In considering the foregoing facts of the variance for the dwelling wall line encroachment there are special or unusual circumstances applying to the subject 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 subject property.

Illegal Lanai - Storage Construction Encroachment. The record does not show unique problems or special conditions which create unnecessary hardship, practical difficulties or destroy the property value of parcel 40 because it is somehow different from other property, particularly adjacent property or other land in the general area. The record fails to demonstrate parcel 40's physical uniqueness for the Kauis's variance request from the minimum side yard setback and clearspace standards; unfortunately to the contrary, parcel 40 is disadvantaged by zoning or setback restrictions equally with other lots in the area.

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Illegal Construction: Self-Created Hardship. The lanai and storage addition to the dwelling was built illegally without permit, a BP was obtained after-the-fact by the Kauis.

In this case any hardship claimed by the applicant is self-created. Since the applicant is the person who caused the condition requiring the variance, it would hardly be proper to compel the issuance of a variance if the applicant were to build in violation of the Zoning Code and then claim hardship entitling him to a variance. If that were the rule, persons who violate the ordinance could do so with impunity. The purpose of a variance is to provide relief from overrestrictive zoning enacted by the county, not from a overrestrictive zoning condition caused by the voluntary acts of the landowner.

After May 24, 1967, buildings, structures or uses are required to be built in conformity with all regulations specified for the district. Zoning Code Sec. 25-83. Before beginning construction, the applicant knew or should have known that the illegal structures required compliance with building permit and Zoning Code requirements.

Consequently, special or unusual circumstances where not found or made evident to apply to parcel 40 which exist either to a degree that deprives the owner 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 lot.

#### ALTERNATIVES

1. The Kauis have available other alternatives to construct the lanai - storage - access addition to the existing one story dwelling. The illegal lanai - storage addition can be located at the rear of the dwelling; a ramp access, if any, can be located through the garage or from the living room front door.
2. Another reasonable alternative for the Kauis was to build the addition legally under a Building Permit. If steps had been taken for the legal construction of the addition the setback and clearspace encroachments could have been avoided, and alternatives could have been suggested, if requested. Instead the Kauis failed to use the building permit process to avoid the illegal encroachment and the very problem they created for themselves. The Kauis also allege that they relied on a family member to comply with the code requirements to build the addition; however as the landowner, the Kauis are ultimately responsible for compliance with all building permit requirements of this County.

INTENT AND PURPOSE

1. Adequate Light, Open Space, & Air Circulation; Regulate Densities; Aesthetic Purposes; Safety from Fire. Generally, the intent and purpose of requiring zoning building setbacks between structures and property lines is to regulate densities, to provide adequate light, space, air circulation, for aesthetic purposes, and safety from fire. Minimum yard requirements are reasonable and valid, therefore.

The adjacent parcel to the south of parcel 40 has a single family dwelling with a detached garage near the encroachment. The storage wall line encroachment on parcel 40 is approximately 1.5 feet from the south easterly side property line, instead of the required 8 feet; and, the minimum clearspace of the south easterly side yard setback is only 1.5 feet, instead of the required 4 feet.

Substantial Adverse Impact to an Area's Character or Adjoining Properties. A variance should not be issued if neighboring property may be adversely affected by a variance. The purpose of a variance is not to confer special privileges on an individual property owner, that is, it is employed to relieve hardship, and not to confer benefits that are not enjoyed by neighboring property.

The encroachment's cumulative effect over the past ten month period has not been minimal or negligible. In the period preceding the variance application a complaint has been made to DPW - Building Division and the Planning Department of the setback violation on parcel 40; as a result, the encroachment has been noted by lay person or building inspector. The effect of the deliberate encroachment undermines the requirements for adequate light, air and open space between the existing dwelling and the adjoining lots.

The Zoning Code requires a minimum side yard setback for a structure wall line and a minimum side yard clearspace for open projections, the setback variance is rejected because the illegal encroachment causes a visual, physical or adverse impact to the adjacent property, parcel 37, 38, 39.

Written objections was submitted by a government agency and a surrounding property owner.

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Based on the foregoing findings, the variance request would 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 be materially detrimental to the public's welfare or will cause substantial adverse impact to the area's character or to adjoining properties.

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The variance request is denied; a modified variance is approved; subject to the following CONDITIONS:

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1. The applicant, its assigns or successors, shall be responsible for complying with all stated conditions of denial and the approved modified variance.
2. The denied variance request & the approved modified variance shall be recorded in the conveyance document of the subject property and a copy of this document shall be submitted to the Planning Department.

Prepare Document to Record Denial of Variance Request and Approved Modified Variance. The landowner is to prepare the documents to record the denied variance and approved modified variance. The draft documents are to be submitted to the Planning Director for review and approval in consultation with the Corporation Counsel. The final approved document is to be submitted for recordation by the Planning Department to the Registrar - Bureau of Conveyances - State of Hawaii. The landowner is to pay for all recordation fees and costs.

Condition to Run with Land Requirement. The document recording the denied variance shall be prepared by the landowner to be a condition that runs with the land binding upon the landowner, his heirs, executors, administrators or assigns, and successors and assigns and shall be incorporated as an exhibit and made a part of each agreement of sale, deed, lease or other similar document affecting the title or ownership of parcel 40.

3. All other applicable State and County rules and regulations shall be complied with.
4. Minimum Clearspace - Open Lanai Projection. The deck line of the existing enclosed lanai is required to be cut back and removed to comply with the minimum four feet clearspace setback requirement of Zoning Code Sec. 25-66(a).

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Secondly, the lattice enclosing the lanai is required to be removed; the lanai is to be opened, and in compliance with Zoning Code Sec. 25-66(a)(1) requirements:

None of the features shall be enclosed above or below the extension except for individual post or beam construction for support, and open or grill type railings no higher than four feet.

5. Storage Wall Line. Measured from parcel 40's south easterly side property line to the existing storage wall line, a minimum 8 feet side yard setback, required by Secs. 25-124(a)(1)(B) and 25-125(b). Remove the storage wall line addition to comply with the minimum yard setback requirement of 8 feet.
6. Variance Approved: Dwelling Wall Line. From parcel 40's south easterly property line to the existing dwelling wall line a variance is approved for a SIDE YARD SETBACK of approximately SIX (6) FEET, more or less.

Review of Director's Action; Interested Party. Zoning Code Sec. 25-27.0.(a)(3) provides that an "interested party" may request Planning Commission review of the director's action. The request must be made within ten (10) working days after notice of the director's decision, in writing. Consequently, in this case the approved modified variance becomes effective after the ten (10) day appeal period has passed; and, the interested party does not request a review of the director's action.

Received: Timely Written Objection. A written objection to the requested variance was filed on 7/8/95 by David Blackmer, the landowner of adjoining TMK: 1-9-11:37, 38, 39. The modified portion of the variance was approved over the timely written objection. Mr. Blackmer appears to qualify as an "interested party" because he is a person who owns property within 300 feet of parcel 40, according to Sec. 25-27.0.(a)(2).

The interested party may request the director's action to be reviewed by the County Planning Commission. If a request is received from the interested party that will initiate the Procedure for Review, Notice, Hearing, and Actions of Sec. 25-27.0.(b) through (d). Consequently, whether the approved modified variance can go in to effect is subject to the ten (10) working day rule, explained above.

We will inform you of any request received to review the Planning Director's action and the procedures that need to be followed. The written objection is subject to public disclosure; please inform us if a copy is needed.



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Appeal of Director's Action by Applicant. According to Zoning Code Sec. 25-27.1, you may appeal the director's denial of your requested variance to the County Planning Commission; however, the appeal must be made within 30 days after notice of the decision.

Enclosed for your perusal is a copy of Sec. 25-27.1, appeal of director's action by applicant; this information has been highlighted, and should be self-explanatory. Also enclosed is a copy of the appeal application form. If you decide to appeal please read this information carefully to prepare the statements, documentation, and materials necessary for the appeal process.

Should you have any questions, please feel free to contact Earl Lucero or Rodney Nakano of this department at 961-8288.

Sincerely,

  
VIRGINIA GOLDSTEIN  
Planning Director

EML:mjs  
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Enclosures