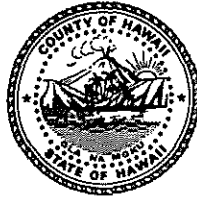


Stephen K. Yamashiro
Mayor



Virginia Goldstein
Director

Norman Olesen
Deputy Director

County of Hawaii

PLANNING DEPARTMENT

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CERTIFIED MAIL
Z 416 229 156

August 3, 1995

Ms. Carla L. Bateman
Drafting, Design, & Planning
94 Kam Ave, Suite 3
Hilo, HI 96720

Dear Ms. Bateman:

Variance Application No. 673 (VAR 95-38)
Applicant: CARLA L. BATEMAN
Variance from Minimum FRONT YARD SETBACK &
CLEARSPACE REQUIREMENTS of OPEN PROJECTIONS
Tax Map Key: 1-1-17:13

After reviewing the complete application, the Planning Director's action is to grant the variance request for the existing single family dwelling with a FRONT YARD SETBACK of 13.97 feet and a corresponding FRONT YARD CLEARSPACE of 8.47 feet required of OPEN PROJECTIONS in lieu of the minimum 15 feet front yard setback and minimum 10 feet front yard clearspace required by Zoning Code Secs. 25-157, 25-124(a)(1), and 25-66(a).

The Planning Director's approval of the variance request is based on the following findings.

SPECIAL AND UNUSUAL CIRCUMSTANCES

1. Location Description. Parcel 13 is a 10,000 square foot lot located on the north side of Pa Alii Street, Royal Hawaiian Estates Subdivision, portion Keaau, Puna, Hawaii. The county zoning is Agricultural-One Acre (A-1a); the state land use is "Agriculture".

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2. Parcel 13 Improvements of Record. According to the applicant and/or County Real Property Tax records the existing single family dwelling with attached garage was constructed under Building Permit No. 51877 (dated 11/8/72) by former owners Raymond and Pauline DeMotta. The Nakiheis became owners of the parcel approximately two years later, in 1974.

According to the applicant and/or county records, the dwelling was constructed before the Nakiheis's purchase of the property. It received all necessary approvals of the Department of Public Works - Building Division.

3. Setback & Clearspace Conditions & Requirements. The boundary survey sketch (4/12/95) prepared by Registered Professional Land Surveyor Robert S. Bright (#4337) shows the existing SINGLE FAMILY DWELLING - ATTACHED GARAGE with a 13.97 feet front yard setback and a corresponding front yard clearspace of 8.47 feet of the open projection. The required front yard setback is a minimum 20 feet, measured from front property line to the dwelling wall line; and, a minimum front yard clearspace of 14 feet, measured from the front property line to the structure's open projection line, a roof eave or open deck/porch/stairway line, for example. As shown on the survey map, the dwelling encroaches into parcel 13's front yard setback by 6.03 feet and by 5.53 feet in the front yard minimum clearspace.

In addition to the existing dwelling, the survey sketch also documents the encroachment of the attached open sided garage in the front yard setback and onto the road right-of-way.

4. Existing Dwelling: As-built Condition. According to the applicant, the house was completed when it was purchased with the property; as a result, the Nakiheis acquired the existing dwelling as-built in 1973 or 1974. They had no reason to conclude that the structure did not meet all applicable county code requirements. The setback problem was discovered 22 to 23 years later when the Nakiheis sold the parcel in 1995. Moreover, not until approximately 1988 did Hawaii state law require a search for and disclosure of all material facts, e.g. zoning violations; and however, this is only required of real property where a Hawaii real estate licensee is representing a party to a prospective transaction, whether for a potential buyer or seller. Hawaii Revised Statutes Chapter 467 secs. 14-18 (amended 1988).

5. Site Plan Conditions & Approval. In 1972 plans were submitted to the Planning Department for building permit approval. Planning Department approval of these plans would be contingent upon a site plan representing compliance with all minimum setbacks required of the proposed dwelling. It has been approximately 23 years since the construction of the existing dwelling was approved by the County.
6. Error: Construction Staking/Siting. Extrapolating from the complete application, the encroachment appears to be an error in the construction staking and siting of the dwelling on parcel 13. A review of the record on this lot did not find contrary evidence.
7. Landowners Good Faith Efforts.. The Nakiheis are trying to resolve a situation which they had no control over, and in good faith they submitted a certified survey to ensure the disclosure of all facts concerning the encroachment.
8. The variance application was filed with the Planning Department on May 10, 1995 and deemed complete.

Therefore, in considering the foregoing facts, 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.

INTENT AND PURPOSE

1. Adequate Light & Air Circulation, Open Space. The intent and purpose of requiring building setbacks within a subdivision is to have adequate air and light circulation between structures and property lines.
2. Minimal Cumulative Effect. Despite the encroachment in the approximate 23 year period preceding the variance application no complaints have been made to the Planning Department of the setback violation on parcel 13. The physical and visual encroachment appears to be minor because it has not been reported as a complaint either by lay person or building inspector. The apparent negligible effect of the encroachment does not affect the requirements for adequate light, air and open space between the existing dwelling and the adjoining lots.

Although the Zoning Code requires a minimum front yard setback for the dwelling wall line and a minimum front yard clearspace for the dwelling's open projections, in this case granting a setback variance is for an encroachment that does not appear to have a visual, physical or adverse impact to the adjacent properties. Moreover, in the application, the applicant or the landowners stated that "[t]he carport which straddles the property line will be demolished. (Emphasis added).

The rest of the existing dwelling complies with the minimum yard setback requirements of the Zoning Code. And written objections were not submitted from any of the participating government agencies.

Based on the foregoing findings, granting the variance request would 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; it will not be materially detrimental to the public's welfare; and will not cause substantial adverse impact to the area's character and to adjoining properties.

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

1. The applicant, its assigns or successors, shall be responsible for complying with all stated conditions of approval.
2. Recordation of Variance Approval; Payment of Filing Fees Requirements. The variance approval with conditions shall be recorded as a part of the conveyance document of parcel 13. The Planning Department will submit the variance approval and conditions for recordation with the Registrar - Bureau of Conveyances - State of Hawaii. The applicant/landowner is to pay for all recordation costs and fees; and, submit or prepare all information or documents needed by the Planning Department to record the variance approval in parcel 13's conveyance document.
3. Requirements:
 - (a). Demolish Carport Encroachment. The applicant, landowner, his heirs, executors, administrators or assigns shall demolish the existing carport that is encroaching over parcel 13's front property line and into the County of Hawaii's right-of-way, shown on the Revised Boundary Survey Sketch of TMK: 1-1-17: 13 (4/12/95) for Escrow #310 18703 T-Y.

Ms. Carla L. Bateman
Page 5
August 3, 1995


- (b). Obtain Building Permit for Demolition of Existing Carport. The applicant, landowner, his heirs, executors, administrators or assigns shall obtain a valid county Building Permit to demolish the carport.
 - (c). Copy of Demolition BP for Department Records. A copy of the issued demolition BP shall be filed with the Planning Department.
4. All other applicable State and County rules and regulations shall be complied with.

Should any of the foregoing conditions not be complied with the Planning Director can proceed to declare the variance permit null and void. For any questions on this matter, please contact Earl Lucero of the Planning Department, 961-8288.

Review of Director's Action; Interested Party. Zoning Code Sec. 25-27(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, the variance becomes effective after the ten day appeal period has passed; and, an interested party does not request a review of the director's action. Should a request be made we will inform you of the procedures that must be complied with.

Sincerely,


VIRGINIA GOLDSTEIN
Planning Director

EML:mjs
6536D

xc: West Hawaii Office
Real Property Tax Office