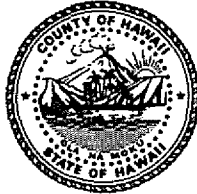


Stephen K. Yamashiro  
Mayor



Virginia Goldstein  
Director  
Norman Olesen  
Deputy Director

## County of Hawaii

### PLANNING DEPARTMENT

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CERTIFIED MAIL  
Z 416 228 787

August 29, 1995

Mr. Sidney M. Fuke  
Sidney Fuke and Associates  
100 Pauahi Street, Suite 212  
Hilo, HI 96720

Dear Mr. Fuke:

Variance Permit No. 685 (VAR 95-23)  
Applicant: KENNETH BROWNING, ET AL  
Variance from Minimum Side Yard Setback(s)  
Tax Map Key: 1-5-87:6, Lot 8

After reviewing your application and the information submitted in behalf of it, the Planning Director certifies the approval of your variance request to allow an existing single family dwelling with a 5 foot side yard setback in lieu of the minimum 8 foot side yard setback, Article 4 (Single Family Residential), SECTION 25-124 (a) (1) (minimum yards). The property is a non-conforming sized parcel within an area zoned Agricultural (A-1a) by the County of Hawaii.

The subject property's address is 15-2699 Welea Street, or Lot 8 in Block 59 of the Hawaiian Beaches Subdivision, Waiakahuila, Puna, Hawaii. The property is located approximately 6 miles from the intersection of Pahoa Road via Kahakai Boulevard. The original two story dwelling and affected carport addition of the existing single family dwelling was built and established on the 7950 square foot parcel zoned Agricultural (A-1a) by the County of Hawaii and on property designated Conservation by the State Land Use Commission prior to December 2, 1985. The subject property or the subject parcel was designated Urban from Conservation on December 2, 1985.

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FINDINGS AND RECOMMENDATION

The Planning Director has concluded that the variance request from the minimum side yard and clearspace requirement(s) should be approved, based on the following findings:

SPECIAL AND UNUSUAL CIRCUMSTANCES

There are special and unusual circumstances that exist which warrant or necessitate a waiver from the minimum side yard requirements for the existing single story carport addition.

The applicant's attachment "VARIANCE REQUEST KENNETH BROWNING TMK: 1-5-87:6, JUSTIFICATION OF REQUEST" submitted with the variance application deemed complete on May 5, 1995 states in part:

"Special and Unusual Circumstances. There are special and unusual circumstances relating to the property that both deprive the owner of substantial property rights as well as interfere with the best use or manner of developing the site.

While there is some measure of responsibility on the part of the applicant via the theory of "caveat emptor" the fact still remains that the siting of the existing dwelling did not allow for the construction of a standard garage or carport. In that regard:

- a. There would be some measure of deprivation of private property rights, as he would be unable to have what is commonly associated with a residential structure (ie., a garage); and
- b. Denial of the variance would interfere with the best use or development of the site, as the other options for the garage would not be feasible and/or would be excessively costly.

Given the location of the dwelling, a standard 2-car garage would not have been feasible to the west, as at least 18 feet would be needed. There is only 11 feet in this area, and with the required 8-foot setback, only 3 feet would be available.

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To the east where the garage is now, it could have theoretically been possible, as the distance between the existing dwelling and the property line is about 30 feet. If the garage were attached to the dwelling, there would be a theoretical conforming setback of 10 feet. However, that alternative would have been very costly and not practical, given the design of the existing dwelling.

The main entrance to the dwelling is from this point. This meant that with an attached garage, another entry would have to be constructed, as one would normally NOT want the main entry to be through one's garage.

Equally so, the house was constructed with its main entry below the grade of the road. For the garage to be built on the same level as the dwelling, it would also have to be below road grade. While that is possible, it would have made egress and ingress to the garage from the road rather precipitous.

It could also have been theoretically possible to construct the garage makai of the dwelling. However, that location would have made the structure more vulnerable to ocean spray and possible ocean runup. During high wave action, sea water has approached this general area. Thus, it would not be prudent from safety standpoint to construct it in that area."

In view of above, the applicant's submittals, and pursuant to available County records, the property was undeveloped and vacant prior to 1980. The original building foundation and original dwelling use was permitted to be established and conditionally permitted by action of the Board of Natural Resources (BLNR) on August 22, 1980 and by letter dated August 25, 1980 to "Mr. and Mrs. Donald Vallance" from the Department of Land and Natural Resources (DLNR). The original Building Permit No. 802990 for the original building foundation and original dwelling was issued to "Don Vallance". The conditional CDUA No. 263 permit to establish use and building permit to construct the original building foundation and existing dwelling on the subject tax map key parcel occurred before the applicants Kenneth A. and Lillian Browning acquired the subject property in 1982.

The subject 7950 square foot property being Lot 8 of the Hawaiian Beaches Subdivision was approved by the County before the adoption of the Zoning Code and Subdivision Control Code in 1967.

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The subject non-conforming sized parcel zoned Agricultural (A-1a) by the County was previously within an area designated Conservation "C" by the State Land Use Commission (LUC) and the parcel was included in the County's petition for a boundary amendment to change the State Land Use Commission's land designation. The Petition or LUC. No. 585 was approved on December 2, 1985, changing the parcel's State Land Use designation from Conservation "C" to Urban "U".

The site plan, drawn to scale, showing the existing carport location, detailed carport building plans, drawn to scale, showing the existing carport's construction details was included and submitted with the variance application. The building plans show the "AS BUILT" foundation, original dwelling location, existing carport addition, and the existing access and driveway location. The plot plan submitted shows a portion of garage 20' x 20' addition and building roof or the existing carport's building eave projection within the minimum eight (8) foot wide sideyard setback area.

The subject building addition or enclosed carport was not mentioned in the CDUA No. 263 permit or included with the permitted building improvement built under Building Permit. No. 802990 issued on December 5, 1980 and closed on June 25, 1982 by the Department of Public Works, Bureau of Building Construction and Inspections.

The property use and any subsequent building improvement requiring a building permit after December 2, 1985 would be subject to the County's Zoning Code and applicable state statutes and building regulations pertaining to building construction. The record in the Department of Public Works and the record in the County's Real Property Tax Office does not support or show any addendum to include and/or add the existing carport to the original building permit and it appears the tax office has not included the carport area to the building improvement component of the property's tax assessment. The site plan and design for the original building foundation to mitigate the sloping site condition and accommodate the original owners decision to utilize and locate the original dwelling within the permitted building envelope on the subject tax map key parcel was conditionally permitted by CDUA No. 263 and established on the subject parcel prior to 1982 and is a circumstance which existed on the property before and after June 25, 1982 prior to the purchase of the property or parcel by the present owners.

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The picture "SUBJECT SITE - 1982" submitted by and with the variance application partly shows the dwelling's foundation and adjacent concrete rock masonry (CRM) foundation. The CRM foundation which appears to have been once utilized as an unprotected parking area for vehicles became and is now utilized as the building foundation under the existing carport addition. The recent field inspection by members of the Planning Department on May 8, 1995 to view and verify existing site conditions and verify existing and surrounding building improvement and pictures taken of and for the record support the applicant's narrative submitted with the variance application. It appears the original decision by the original owners to site and construct the access location and driveway, original building foundation, original dwelling orientation and design, off-street parking space location, and cesspool location, was a circumstance and combination of existing design factors offered the present owners limited building options to expand or allow for additional living space and future building improvement.

Therefore, in considering the foregoing facts, it is determined there are special or unusual circumstances applying to the subject property which exist to a degree which deprives the present owners 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.

#### ALTERNATIVES

There are no reasonable alternatives in resolving the difficulty of the applicant. Alternatives available to the applicant include: removing the building encroachment together with the affected roof resulting in a smaller carport or modifying existing living space; acquiring additional property from the adjacent parcel (TMK: 1-5-87:7, Lot 7); demolish, design, and reconstruct or construct a new dwelling and enclosed carport within the building envelope prescribed by the Zoning Code, and other similar design alternatives, etc. The re-siting, redesign of the existing dwelling built and established on the property in 1982 by the original owner(s) and the applicant(s) is economically unreasonable and would disrupt the dwelling's design, compromise building integrity, and change the dwelling's interior or spacial relationship between rooms and living area.

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INTENT AND PURPOSE

The intent and purpose of requiring building setbacks within a subdivision is to provide space, admit light, promote air circulation, and provide a separation between permitted structures in case of a fire or emergency, etc. The existing dwelling and carport was built and established on the subject parcel between 1980 and 1984, was planned, established, permitted, built, and inspected by the County, prior to December 2, 1985. The original access to the property, building foundation, off-street parking area, and dwelling was planned, permitted, inspected by the County, and built before the applicants purchased the property in 1982. The original building foundation and dwelling complied with CDUA conditions and the building code in 1982. Subsequent to purchasing the property after June 25, 1982 the applicants built and enclosed a carport addition to the original dwelling to protect their vehicles on what appears to be a portion of the original building foundation without amending or securing a CDUA permit from the State BLNR/DLNR and securing a County building permit. The change in 1985 from a Conservation designation to Urban designation by the State Land Use Commission precluded the need for the present owners to apply for and obtain a CDUA permit from the State and further, in addition to compliance with the County's Building Code, required permitted use and structures to respect and minimum building setback requirement and the Zoning Code. The applicants are anxious to correct their oversight to secure a building permit for the existing carport improvement. The applicants have prepared and will submit detailed building construction plans for the existing carport and building permit application to the Department of Public Works, Building Division for consideration, review, and approval. The carport encroachment constructed by the applicants is similar to and architecturally compatible with the existing dwelling and surrounding dwellings located in the neighborhood. The property most directly affected by the subject variance application is parcel (Lot 7) or TMK: 1-5-87:7 (Lot 7) which is the adjacent coterminous property sharing the common north side property line.

The closest or nearest dwelling on TMK:1-5-87:8, Lot 6, secured a building permit in June 1981, is situated in excess of 65 feet from the subject enclosed carport/building encroachment. The dwelling on parcel 8, Lot 6 started construction and would be subject to inspection by building officials before the building permit was issued to Mr. Don Vallance to construct the building

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improvement on the subject parcel. County building records imply the dwelling on Lot 6 and subject building improvement on Lot 8 indicate both dwellings are being built and were concurrently under construction at the same time. The active building permits in this area would have required building inspections by the DPW building inspector(s) and/or allowed the DPW to monitor or observe any further or unusual building activity on the subject property or in the immediate vicinity or neighborhood. The side yard setback problem was not discovered until the applicants listed the property for sale and probably would have remained undiscovered if the owners had not voluntarily tried to resolve the building setback violation under the Zoning Code and secure a building permit for the building addition. As such, it appears the existing carport subject building encroachment into the Lot 8's side yard setback area will not visually, physically or adversely affect the rights of the property owner(s) of Lot 7. The subject carport and building encroachment containing approximately 60 plus square feet of enclosed area and existing roof overhang into the affected side yard setback area has gone unnoticed for more than twelve (12) years.

The subject variance application was deemed complete by the Planning Department on May 5, 1995 and by letter dated July 3, 1995 and by subsequent discussion and mutual agreement and understanding by and between Mr. Sidney M. Fuke and staff, the decision date by the Planning Director on the subject variance would be extended and deferred until August 31, 1995.

There were no objections from the surrounding property owners, concerns or comments received from the State of Hawaii, Department of Health and Department of Public Works (DPW), Engineering Division to the subject variance request (VAR 95-23).

Based on the above cited considerations, enclosed carport building improvements, the removal, re-siting and/or re-designing of the existing improvements without design changes to the building's architecture and appearance of the existing or original dwelling would be undesirable. The Planning Department acknowledges there may be design or building alternatives available to the applicants recited in the variance application's detailed written explanation/request and above variance background. However, these alternatives are deemed to be unreasonable at this time and would place excessive demands on the present owners when a more reasonable alternative is available by the granting of this variance application.

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Therefore, this variance 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. The applicant, its successors and assigns, shall indemnify and hold the County of Hawaii harmless from and against any loss, liability, claim or demand for property damage, personal injury and death arising out of any act or omission of the applicant, its successors, assigns, officers, employees, contractors and agents under this variance or relating to or connected with the granting of this variance and a building permit for the subject non-permitted building improvement/encroachment;
3. The approval of this variance is only from the Zoning Code; minimum side yard and clear space requirement(s); and,
4. The applicant and/or owner shall submit building construction plans and secure a building permit for the non-permitted building improvement as of the date of this variance. Future building improvement and use on the subject parcel TMK: 1-5-87:6, Lot 8 shall be subject to State and County regulations pertaining to occupancy and building construction.

Should any of the foregoing conditions not be complied with, the Planning Director may proceed to declare this Variance Permit null and void.

Sincerely,

  
VIRGINIA GOLDSTEIN  
Planning Director

WRY:mjs