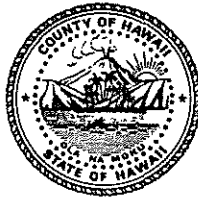


Stephen K. Yamashiro  
Mayor



Virginia Goldstein  
Director

Norman Olesen  
Deputy Director

## County of Hawaii

### PLANNING DEPARTMENT

25 Aupuni Street, Room 109 • Hilo, Hawaii 96720-4252  
(808) 961-8288 • Fax (808) 961-9615

CERTIFIED MAIL  
Z 095 324 161

May 23, 1997

Steven S.C. Lim, Esq.  
Carlsmith Ball Wichman Case & Ichiki  
P. O. Box 686  
Hilo, HI 96720

Dear Mr. Lim:

Variance Permit No. 827 (VAR 97-12)  
Applicant: ALICIA OTIS  
Request: Variance From the Minimum Yards and Permitted Projections  
Into Yard and Open Spaces, Pursuant to Chapter 25, Zoning  
Tax Map Key: 9-4-015:057, Lot 7

After reviewing your application and the information submitted on behalf of it, the Planning Director certifies the approval of your variance request. Variance Permit No. 827 allows the existing (two story farm dwelling) situated on the subject property to have one side yard being minimum four (4.0) feet in lieu of the minimum eleven (11) foot side yard and rear yard being minimum nine (9.0 ) feet in lieu of the minimum twenty (20) foot rear yard required for the subject property zoned Agricultural (A-20a), Division 7, pursuant to Section 25-5-77, Minimum yards, (a); and side yard clearspace of 2.5 feet or 30 inches in lieu of a minimum six (6) foot side yard open space requirement and 9.0 feet in lieu of a minimum fourteen (14) foot rear yard open space requirement pursuant to Section 25-4-44 (a) (1), Permitted Projections Into Yards and Open Spaces.

The subject property is Lot 7, being a Portion of Green Sand Subdivision, Unit II, F.P. 1076, situated at Kau, Island and County of Hawaii. The property and existing building improvements thereon are more commonly identified by the tax map key parcel number, Tax Map Key: 9-4-015:057, Lot 7.

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## FINDINGS AND RECOMMENDATION

The Planning Director has concluded that the variance request from the minimum side and rear yard and associated open space requirements should be approved based on the following findings:

## SPECIAL AND UNUSUAL CIRCUMSTANCES

1. The subject 12,000 square foot parcel is zoned Agricultural (A-20a) by the County. The property is designated Agriculture "A" by the State Land Use Commission (LUC).
2. The existing building and related site improvements were issued a building permit (B NO. 830394) by the Department of Public Works (DPW), Building Division on March 14, 1983. To date, Building permit no. 830394 is still an active building permit.
3. The site plan drawing, drawn to scale and dated November 3, 1995, by Ali Ghalanfarsa, AIA, denotes the minimum building setback lines and identifies the location of all existing dwelling and cesspool on the subject property. The existing two (2) story dwelling exhibits the following range of side yard dimensions; 4.92 and 5.43 feet and 11.75 and 12.00 feet between the face of the building and the respective side and rear property lines. In addition to the foregoing information presented by the applicant and pursuant to a recent site inspection, Planning Department staff noted the existence of two (2) foot roof eave projection beyond all building walls and included and identified the roof two (2) foot roof eave projection on the site plan submitted by the applicant with the variance application.
4. Building Permit No. 830394 was issued to a Michael Pelosi, by the Department of Public Works (DPW), Building Division, on March 14, 1983, to construct a new two (2) story dwelling together with other necessary site and related building improvements. Subsequent to the issuance of the building permit, it appears the electrical permit and plumbing permit were also obtained from the DPW, Building Division. The required building inspections by the effected government agencies of the new dwelling and related site improvements occurred during the life of the B NO. 830394. To date, B NO. 830394 is still an active building permit and has not been closed by the DPW, Building Division.

5. It appears the original site plan and building construction plans submitted with the building permit application were reviewed and approved by the Planning Department on March 14, 1983. The inspectors or job site copy of the approved construction plans approved by the County on March 14, 1983 were not available. The "AS BUILT" plans, drawn and dated during 1995, were prepared for the subject variance application.
6. The applicant's statements included with the subject variance application imply the approved building and existing building encroachments within the effected side and rear yards were undetected by the County, other government agencies, and the surrounding property owners within the subdivision until the property was offered for sale.
7. The State Department of Health (DOH) memorandum dated February 26, 1997, and received on February 27, 1997, states in part:

"The Department of Health has no record of the existing cesspool indicated on the plot plan. The owner is required to submit information for cesspool record to be filed by the Department of Health. Cesspool record forms may be obtained from my office (Ph.933-4371)."
8. The Department of Public Works (DPW) memorandum dated February 26, 1997, and received on February 27, 1997, states in part:

"Building shall conform to all requirements of code and statues pertaining to building construction. Building setbacks shall conform to fire resistive protection requirements of the Uniform Building Code (UBC) Chapter 5."
9. The Department of Finance-Real Property Tax office memorandum date March 6, 1997, and received on March 7, 1997, states in part:

"...Omitted assessment to be processed for 3 years (1994,1995, & 1996) as our records did not reflect a building on the premises...

Real Property taxes are paid through June 30, 1997,..."
10. The following statements are extracted from a detailed written explanation prepared by the applicant's representative, Steven S.C. Lim, Esq., of Carlsmith Ball Wichman Case & Ichiki, dated January 1997, which was included with the variance application:

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"..Applicant, a New Mexico resident, purchased the Property in 1992 following a vacation in the Ka'u District, with plans to relocate to the Big Island. Unfamiliar with building permit and contractor licensing requirements of the County and State, Applicant entrusted supervision of design and construction of a new residence on the Property to a local builder. The resultant structure was an incorrectly sited dwelling, built without permit, by unlicensed contractors, for which Applicant made full payment. Applicant has been unable to obtain relief from said contractors.

When subsequently forced to abandon her plans to relocate to the Big Island given new demands of raising of a grandchild in Santa Fe, applicant contacted a local realtor to market her newly built Ka'u residence, at which time she was first advised of possible problems with the unpermitted, incorrectly sited structure. Applicant initially tried to obtain the consent of adjacent property owners to relocate common property boundaries to alleviate rear yard and west side yard encroachments. However, both adjacent property owners declined to do so.

Applicant has since retained a team of licensed consultants , including a surveyor, architect , contractor and attorney, to compile the necessary documentation submitted herein for the subject variance application..."

The owner/applicant discovered the existing building encroachments after the two (2) story building was constructed and established on the property and after the current owner contacted a realtor to market the property. The detailed site and "as built" building plans submitted with the variance application identifies the building encroachments within the affected yards. Therefore, considering the above and foregoing facts pertaining to the past and current history of the existing improved property, and the present condition of the property, it is felt there are special or unusual circumstances applying to the subject property which exist either to a degree which deprive the owner/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.

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## ALTERNATIVES

There are no reasonable alternatives in resolving the difficulty of the owner(s)/applicant(s). Alternatives available to the applicant include the following: removing the existing building encroachments together with the effected roof eaves resulting in a smaller living space; acquiring additional property from the adjacent property or relocate the dwelling or construct a new dwelling within the correct building envelope prescribed by the Zoning Code, on the non-conforming sized lot and other similar design alternatives, etc. The removal of the building encroachments or the re-sitting, redesign, and remodeling, etc. of the existing dwelling would be economically unreasonable and possibly disrupt the dwelling's building integrity, existing interior room circulation, and disrupt other existing site improvements.

The current owner and applicant discovered the building encroachments after the property was listed for sale and have identified the existing building encroachments within the affected side and rear yard(s), on their own volition, are honestly trying to resolve four (4) year old building encroachment problems. No evidence has been found to show indifference or premeditation by the previous owner/builder in 1983 to deliberately or intentionally allow the building encroachments to occur.

The Planning Department acknowledges there may be other design or building alternatives available to the owners/applicants recited above. However, these design and building 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 the subject variance request.

## INTENT AND PURPOSE

The intent and purpose of requiring building setbacks within a subdivision are to assure that adequate air and light circulation is available between permitted structure(s) and property lines. The existing dwelling and related building improvements were constructed under a valid building permit issued to the past and current owners. Building inspections of the premises and building construction during the life of the building permit did not disclose any setback irregularities. The previous owner(s) or builder felt all Zoning Code, building permit requirements and government procedures were observed and all County building requirements were satisfied or met.

The building encroachments have been built within one of the property's side yards and within the rear yard. The fourteen (14) year old building encroachments into the respective side yard are not physically and visually obtrusive.

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The existing 14 year old two (2) story dwelling's design and related site improvements are similar to other dwellings within the subdivision. The building encroachments do not depreciate or detract from the character of the surrounding neighborhood, residences, public uses, and the existing and surrounding urban land patterns. It appears, the existing building encroachments established over 14 years ago within the affected side yard and rear yard have not visually, physically or adversely affected the rights of the property owners of the adjacent vacant parcels. Therefore, it is felt the present location and existing building encroachments will not detract from the character of the immediate neighborhood within the subdivision. It appears the existing building encroachments were induced by a cumulation of foundation and construction errors or misunderstanding or misinterpretation of the minimum building yards or "building setbacks" by the previous owner and/or builder. The bulk or remaining portion of the "living area" and "open patio areas" within the existing dwelling envelope complies with the minimum yards of the Zoning Code. The existing cesspool identified on the site plan submitted with the variance application was probably installed and constructed under the original permit issued in 1983.

The objections received from the surrounding property owners will be subject to the procedures and provisions stipulated in Chapter 25, Zoning, amended December 7, 1996. Otherwise, there were no objections received from the participating government agencies.

The subject variance application was deemed complete on January 29, 1997. Pursuant to a field inspection, technical notations were added to the site plan dated November 1995 by Planning Department staff during April 1997 under the direction of the applicant's representative, Mr. Steven S.C. Lim, Esq. for the record. An extension of time until May 23, 1997, to render a decision on the subject variance application was mutually agreed upon.

Based on the foregoing findings, this 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; 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:

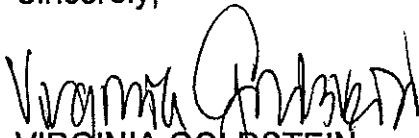
1. The applicant(s)/owners, their assigns or successors shall be responsible for complying with all stated conditions of approval.

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2. The applicant(s)/owners have identified and acknowledged the subject building encroachments and residential use were built and established within one of the side yards of the subject property. A portion of the existing farm dwelling does not comply with the minimum side yard requirements prescribed by the Chapter 25, Zoning dated December 7, 1996. The applicant(s)/owners, successors or assigns shall indemnify and hold the County of Hawaii harmless from and against any loss, liability, claim, or demand for the property damage, personal injury, or death arising out of any act or omission of the applicants/owners, their successors or assigns, officers, employees, contractors, or agents under this variance or relating to or connected with the granting of this variance.
3. The approval of this variance is only from the Zoning Code minimum side and rear yard and related clear or open space requirements.
4. The remaining requirements of active building permit (B No. 830394) shall be addressed and satisfied by the applicant(s) or current owner(s) and closed by the Department of Public Works, Building Division on or before May 20, 1999, or conveyance of the property, which ever comes first.
5. Future building improvements and permitted uses shall be subject to State law and County ordinances and regulations pertaining to building construction and building occupancy.

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:mlm  
F:\WP60\WRY\FORMLETT\VARAPP50.

xc: Real Property Tax Office