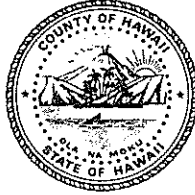


Stephen K. Yamashiro
Mayor



Virginia Goldstein
Director

Russell Kokubun
Deputy Director

County of Hawaii

PLANNING DEPARTMENT

25 Aupuni Street, Room 109 • Hilo, Hawaii 96720-4252
(808) 961-8288 • Fax (808) 961-8742

CERTIFIED MAIL

7099 3220 0000 4869 5486

October 5, 2000

Mr. Martin Stuart, AIA
MARTIN STUART, LTD.
P. O. Box 11481
Hilo, HI 96721

Dear Mr. Stuart:

VARIANCE PERMIT NO. 1150 (VAR 00-054)

Applicant: MARTIN STUART, LTD.

Owners: NIGEL F. PALMER, M.D.

**Request: Variance From the Minimum Yards and Permitted Projections
Into Yard and Open Spaces, Pursuant to Chapter 25, Zoning,**

Tax Map Key: 1-5-038:096, Lot 255

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. 1150 allows a portion of the existing dwelling to remain within the affected side yard and open space "AS BUILT" with a minimum side yard of 8.82 feet and minimum open space of 6.05 feet +/- in lieu of the minimum 20 feet and minimum open space of 14 feet, as required by the Zoning Code, Chapter 25, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), and Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open spaces, respectively.

FINDINGS AND RECOMMENDATION

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

SPECIAL AND UNUSUAL CIRCUMSTANCES

1. The subject property containing 1.00 acre is Lot 255, Block 4, Land Court Application 1053, Hawaiian Paradise Park Subdivision, Keaau, Puna, Hawaii. The property was zoned Agricultural (A-1a) by the County in 1967.

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2. The applicant's representative submitted a letter, dated July 6, 2000, for the variance file on July 10, 2000 and attached copies of past building permits issued by the Department of Public Works (DPW)-Building Division on the subject tax map key (TMK) parcel. The letter states in part:

"A building permit No. 58949 was issued on March 15, 1974 to Mr. & Mrs. Leonard Milotta. The permit was for a three bedroom, two bath single family dwelling. The permit was not closed.

A building permit No. 781493 was issued on June 14, 1978 to Donald D. Tabor. The permit was for a catchment roof addition to an existing catchment tank. The permit was closed.

A building permit No. 801339 was issued on May 27, 1980 to Donald D. Tabor. The permit was for a bedroom and carport addition to the dwelling. The permit was closed.

The present owner Nigel F. Palmer, MD. has not been a party to any past or current building permits for the aforementioned TMK.

For your information. (Handwritten)

Please attach to variance" (sic) (Handwritten)

3. It appears the site plans attached to the detailed building construction plans for the building permits to construct the dwelling, garage, and other accessory structures were reviewed and approved by the Planning Department and other affected government agencies. The required building inspections were conducted by DPW building inspectors and by representatives from other affected government agencies of all building improvements on the property. It appears that B P No. 58949, issued to the previous owner(s) to construct the dwelling, was not closed by the DPW.
4. The site plan drawing, drawn to scale, by Martin Stuart and dated June 9, 2000, and a survey map, drawn to scale, by Murray, Smith and Associates, Ltd. and dated March 24, 2000, identify the location of the dwelling and portions of a swimming pool. The survey map identifies the location of the building encroachments and identifies the location and remains of the former swimming pool. Furthermore, the site plan denotes the distances between the respective dwelling encroachments and the affected side boundary line.

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For the record, a site inspection was conducted to view the subject building encroachments and surrounding site improvements by Planning Department staff, Applicant-Martin Stuart, AIA, and Realtor-Rick Barbati on August 29, 2000. Portions of the former swimming pool have been demolished.

5. The applicant's transmittal letter, dated April 18, 2000 and submitted with the variance application on June 29, 2000, states in part:

"We are hereby requesting a variance on the above property for dwelling and roofline that encroaches into the setback area.

Under item #1 of the "application for variance", we feel that the special and unusual circumstances that may deprive the owner of substantial property rights is that the property is currently in escrow with the Buyer attempting to purchase the property under a conventional Loan. The Lender and the Buyer will not allow the sale to go through unless the encumbrance or encroachment into the setback is resolved. (sic) Unless it is constructed in 1974. The present Owners were unaware of the encroachment when they purchased the property.

Under item #2, there are no other reasonable alternatives available. The dwelling is built with conventional framing and on a concrete slab, therefore the cost factor will be very high to move the dwelling.

Under item #3, we do not feel the variance would cause substantial or adverse impact to the public or the area's character."

6. The Department of Finance-Real Property Tax memorandum dated August 4, 2000, in the subject variance file states in part:

"There are no comments at this time"

"Current Real Property taxes are paid through June 30, 2000."

7. The State Department of Health (DOH) memorandum dated August 9, 2000, in the subject variance file states:

"We have no objections to the proposed variance application. However, minimum setback requirements for existing wastewater systems needs (sic) to be maintained."

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8. The Department of Public Works (DPW) memorandum dated August 24, 2000, states in part:

"We have reviewed the subject application forwarded by your memo dated July 31, 2000 and oppose the approval of the application for the reason noted below. Permits H58949 and EH56294 for the subject dwelling were never finalized."
9. Proof of mailing was submitted on August 10, 2000. Correspondence and several objection letters to the variance application were received from the surrounding property owners and are part of the variance file. For the record they are:
 - a. Letter by Laurel A. Dekker, dated February 28, 2000, was received by the Planning Department on July 14, 2000.
 - b. Objection letter from Janice Fukuda, dated July 20, 2000, was received by the Planning Department on July 24, 2000.
 - c. Copy of Letter (Fax-2 Pages) dated August 15, 2000 from Laurel A. Dekker to Planning Director was received on August 16, 2000.
 - d. Copy of a Letter (Fax-2 Pages) dated August 15, 2000 from Laurel A. Dekker to Applicant, was received on August 16, 2000.
 - e. Copy of Letter dated August 15, 2000 from Applicant to Janice F. Fukuda was received on August 15, 2000.
 - f. Copy of Letter dated August 15, 2000 from Applicant to Laurel A. Dekker was received by the Planning Department on August 15, 2000.
 - g. Letter (Hard Copy/Signed) dated August 15, 2000 from Laurel A. Dekker to Planning Director was received by the Planning Department on August 21, 2000.

The applicant submitted a survey map/site plan which identifies the location of the existing dwelling and remaining portions of the swimming pool. These plan submittals identify the distance between the dwelling and the affected side boundary lines. Portions of the existing dwelling and swimming pool were constructed within one of the property's two side yards. The swimming pool use has been abandoned and encroachments within the affected side yard and on the adjacent property were demolished and partly filled in.

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Therefore, considering the foregoing facts and circumstances, 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.

ALTERNATIVES

There are no reasonable alternatives in resolving the difficulty of the current owners. Alternatives available to the applicant include the following: Removing the existing building encroachments, relocating the dwelling to fit within the correct building envelope prescribed by the Zoning Code, and other similar design alternatives, etc. The removal of the dwelling encroachments constructed within the affected side yard by the previous owner(s) are economically unreasonable at this time and could disrupt the dwelling's structural integrity and the relationship between the existing dwelling and other site improvements.

The applicant, on behalf of the owners, is honestly trying to resolve a building encroachment problem which was built and established on the property and status of the building permit(s) issued to the previous owner(s). No evidence has been found to show indifference or premeditation by the current owners to deliberately or intentionally allow the building encroachment problems to occur. The swimming pool and other building encroachments were demolished.

The Planning Department acknowledges there may be other design or building alternatives available to the owner/applicant 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 or applicants 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, water tank, and swimming pool (demolished) were constructed under a series of building permits issued to the previous owner(s). It appears that the building inspections of the premises, during building construction and throughout the life of the building permits did not disclose any building setback irregularities. The current owners and applicant became aware of the encroachment problems after purchasing the property.

The circumstances which permitted the existing building improvements to be built on the property are unique. The existing building encroachments have been built within one of the two side yards.

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The existing building encroachments are not physically and visually obtrusive from the existing adjacent property or rights-of-way. It appears the building encroachments do not depreciate or detract from the character of the surrounding neighborhood, public uses, and the existing and surrounding land patterns. It appears the existing building (dwelling) encroachments on the property and within the affected side yard were the result of mapping and building discrepancies or misinterpretation of the minimum yards during building construction by the previous owner(s). Inspection of the property during the life of the building permits by government agencies did not discover any building encroachment or disclose any irregular building setback problems. Therefore, it is felt that the existing dwelling encroachments will not detract from the character of the immediate neighborhood or the subdivision.

The subject variance application was acknowledged by certified letter dated July 31, 1999. Additional time to allow the applicant to address the concerns of the surrounding property owners and review past building permits was required.

Based on the foregoing findings, this variance request would be consistent with the general purpose of the zoning district and the intents and purposes of the Zoning Code, Subdivision Code and the County General Plan. Furthermore, the variance request 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/owner, their assigns or successors shall be responsible for complying with all stated conditions of approval.
2. The approval of this variance is only from the Zoning Code. The applicant/owner, 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. Portions of the existing dwelling and roof eave will not meet Chapter 25, the Zoning Code's, minimum side yard and related permitted projections into yards and open space requirements. The approval of this variance allows the existing building improvements identified on the site plans submitted with the variance application, dated March 24, 2000 and June 9, 2000, respectively, to remain on the subject property. The applicant/current owner(s) shall address and close B. P. No. 58949 prior to any title changes and/or conveyance of the subject property.

Mr. Martin Stuart, AIA
MARTIN STUART, LTD.

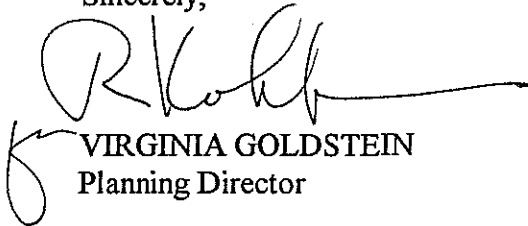
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4. Future building improvements and permitted uses shall be subject to State law and County ordinances and regulations pertaining to building construction and building occupancy.

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/RK:pak

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c: Real Property Tax Office
Ms. Janice Fukuda
Ms. Laurel A. Dekker