

Harry Kim
Mayor



Christopher J. Yuen
Director

County of Hawaii

PLANNING DEPARTMENT

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

CERTIFIED MAIL

7000 0600 0024 2904 8666

January 26, 2001

Robert D. Triantos, Esq.
Carlsmith Ball LLP
P.O. Box 1720
Kailua-Kona, Hawaii 96745

Dear Mr. Triantos:

Variance Application WH(VAR 00-063)
Variance No. 1178
Applicant: MEI-LING OPU'ULANI ENGLERT
Owner: MEI-LING OPU'ULANI ENGLERT
Request: Variance From Minimum Side Yard Requirements
Tax Map Key: 7-3-032:028

After reviewing your application and the additional information submitted on its behalf, the Planning Director certifies the approval of your variance request to allow an existing one story single family dwelling with a 9.50 feet to 9.60 feet side yard in lieu of the minimum 10 feet side yard as required by Ordinance No. 96-160, Chapter 25, Article 5, Division 1, Section 25-5-7(a)(2)(B), Ordinance No. 97-88.

Please accept our sincere apologies for this tardy confirmation of the approval granted to allow the requested variance. As confirmed with Mr. Royden Yamasato of your staff, you have agreed to an extension of time to January 31, 2001, for a decision to be rendered by the Planning Director.

The subject property is located at Kona Palisade, Unit I, Lot 183, File Plan 1061, at Kalaoa 5th, North Kona, Hawaii, Tax Map Key: 7-3-032:028.

SPECIAL AND UNUSUAL CIRCUMSTANCES

1. The subject property consists of 10,080 square feet of land area.
2. The subject single family dwelling was issued the following building permits:

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- a. Building Permit No. K03549 was issued on April 17, 1979, for the construction of a one-story single family dwelling containing three bedrooms and two bathrooms. This structure passed final inspection and the permit was closed on August 20, 1979.
- b. Building Permit No. K03762 was issued on August 1, 1979, for the addition of a 5' by 5' deck extension to the existing dwelling then under construction. This addition passed final inspection and the permit was closed on August 8, 1980.
3. A survey map prepared by Kevin McMillen of KKM Surveys on July 25, 2000, shows the one story single family dwelling with a 9.50 feet to 9.60 feet side yard in lieu of the minimum required 10 feet side yard. As such, the one story single family dwelling encroaches 6 inches to 7- $\frac{1}{4}$ inches into the minimum 10 feet side yard.
4. When the building permits were approved, the owner received all of the necessary Department of Public Works, Building Division approvals for the dwelling.
5. When approved by the Planning Department, the plans would have had to have shown that all minimum required setbacks were going to be adhered to for the dwelling in 1979.
6. There appears to have been a construction staking error in the siting of the structure on the property. This occurred in 1979 when the dwelling was constructed. There also appears to have been a very minor siting error made at the time of construction with the encroachment. No other evidence has been found to show otherwise.
7. It has been over 21 years since the construction of the existing dwelling was approved by the County, and the applicant is trying to resolve a situation over which she had no control and has honestly conducted a certified survey to ensure the disclosure of all facts concerning the dwelling and improvements.
8. The variance application was filed with the Planning Department on August 7, 2000.
9. On August 16, 2000, ownership of the subject property was transferred from Mei-Ling Opu'ulani Englert to Charles W. Rice.
10. The County Department of Public Works, Engineering Division, memorandum dated August 29, 2000, states:

"We have reviewed the subject application and have no comments.

"If you have questions please contact Kiran Emler of our Kona office at 327-3530."

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11. The State Department of Health memorandum dated August 21, 2000, states:

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

A letter of objection to the variance application has been received from the current property owner, Charles W. Rice. (See Exhibit A – Letter dated September 2, 2000, and attachments). Mr. Rice alleges that unpermitted improvements to the dwelling have resulted in the violation of the applicable minimum yard requirements, thus necessitating the variance application. However, Planning Department staff has been unable to confirm whether these allegations of violations are accurate. It should be noted that the Department of Public Works did not identify any building violations in its memorandum dated August 29, 2000.

Therefore, considering the foregoing facts, the Planning Director has determined that 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.

ALTERNATIVES

1. The applicant on her own volition is honestly trying to resolve this long-standing problem which was not created by her. The investigation of this particular matter has not revealed any deliberate or intentional grounds in allowing the encroachments to occur.
2. Any architectural alterations or design changes to the dwelling to conform to the minimum setbacks would create undue and excessive hardships for the applicant when other more reasonable options are available.

Based on the above-cited considerations, there are no reasonable solutions available without excessive demands being placed on the owner when a more reasonable alternative is available by the granting of this variance application.

INTENT AND PURPOSE

The intent and purpose of requiring building setbacks within a subdivision is to assure that adequate air and light circulation is available between structures and property lines. The dwelling encroaches only 6 inches to 7-¼ inches into the 10 foot side yard and, as such, does not significantly compromise the intent and purpose of the Zoning Code to provide for adequate air and light circulation.

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Therefore, while the Zoning Code requires a minimum 10 feet side yard in this particular case, the encroachments will not visually or physically impact or be adverse to any adjacent properties or development with the granting of this variance. The rest of the existing dwelling complies with the minimum yard requirements of the Zoning Code.

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, this variance 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 owner, assigns or successors shall be responsible for complying with all stated conditions of approval.
2. The approval of this variance shall be included in the conveyance document for the subject property and a copy of the recorded conveyance document shall be submitted to the Planning Department within a year from the effective date of approval of this variance.
3. Within thirty days of the effective date of approval of this variance, the owner, assigns or successors shall contact the Planning Department's West Hawaii Office to schedule an inspection of the subject property. At the inspection, a Planning Department representative shall be accompanied by a representative of the Building Division of the Department of Public Works, for the purpose of determining whether there have been any unpermitted improvements and/or additions to the single family dwelling, or unpermitted structures built elsewhere on the subject property. Should the representatives of the Planning Department and the Department of Public Works determine that there are such unpermitted structures, improvements and/or additions on the property, the owner, assigns or successors shall be responsible for securing the necessary building permits, in accordance with the applicable requirements of all affected agencies. Any building permit obtained in compliance with this condition must meet with the final inspection approval of the Building Division of the Department of Public Works and be closed within one year of the effective date of approval of this variance. Upon receipt of final inspection approval for the required building permits, the applicant shall be required to demonstrate to the satisfaction of the Planning Director that this condition has been complied with. An initial extension of time for the performance of this condition only may be granted by the Planning

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Director upon the following circumstances:

- A. Non-performance is the result of conditions that could not have been foreseen or are beyond the control of the owner, assigns, or successors and that are not the result of their fault or negligence.
 - B. Granting of the time extension would not be contrary to the General Plan or Zoning Code.
 - C. Granting of the time extension would not be contrary to the original reasons for the granting of the variance approval.
 - D. The time extension granted shall be for a period not to exceed the period originally granted for performance (i.e., a condition to be performed within one year may be extended for up to one additional year).
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 may proceed to declare this Variance Permit null and void.

Should you have any questions, please feel free to contact Pamela Harlow of my staff at 327-3510.

Sincerely,


CHRISTOPHER J. YUEN
Planning Director

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Enclosures

xc: Charles W. Rice
Raymond Kimoto, DPW Building Division
West Hawaii Office