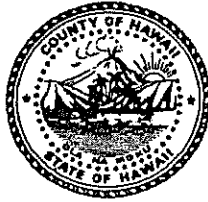


Harry Kim
Mayor



Christopher J. Yuen
Director

Roy R. Takemoto
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
7000 0600 0024 2904 1001

February 13, 2001

Ms. Robyn Kam-Malczon
c/o CENTURY 21
HOMEFINDERS OF HAWAII
586 Kanoiehua Avenue
Hilo, HI 96720

Dear Ms. Kam-Malczon:

VARIANCE PERMIT NO. 1185 (VAR 00-090)

Applicant: ROBYN KAM-MALCZON

Owner: DAVID E. BRINKLEY

**Request: Variance from the Minimum Yards and Permitted Projections
Into Yard and Open Spaces, Pursuant to Chapter 25, Zoning,
Tax Map Key: 1-5-040:086**

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. 1185 allows portions of the existing dwelling and water tank "AS BUILT" to remain upon the subject property (Lot 286) with a minimum 23.80 feet rear yard and 23.80 open space from the respective rear boundary line in lieu of the minimum 30 feet rear yard and 24 open space requirements as required by the Zoning Code, Chapter 25, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), (1), (B), 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 yards and open space requirements should be approved based on the following findings:

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SPECIAL AND UNUSUAL CIRCUMSTANCES

1. The subject property containing 1.00 acre is Lot 286, Block 5, Map 57, Land Court Application No. 1053 (Amended), Hawaiian Paradise Park Subdivision, Keaau, Puna, Hawaii.

The property was zoned Agricultural (A-1a) by the County in 1967. It appears that the existing dwelling, ohana dwelling permit, and building permits to allow the existing dwellings and related site improvements located on the subject TMK property were approved in the 1980s to previous owner(s).

2. The applicant's representative submitted a "Detailed written explanation", dated October 20, 2000 which states in part:

"I am assisting my client in applying for a variance from the zoning code for the property located at TMK:3/1-5-40:86. Applicant name is David E, Brinkley (currently working and residing in Saudi Arabia). Subsequent to the close of escrow, a survey of the property disclosed that the dwelling and catchment tank encroached into the rear yard. The reasons for this variance are as follows:

1. The rear house extends 6.20 feet into the County Zoning Code building setback of 30 feet. The catchment tank extends 2.29 feet into the same setback. See attached surveyors map.
2. Pursuant to the County Zoning Code, the side setback is 25 feet. As such, the location of the ohana dwelling is non-conforming. See attached surveyors map.

The circumstances, which permitted the existing building improvement to be built on the property, are unique. The existing dwelling and catchment tank were built within the existing rear yard and were completed prior to the purchase of the property by the current owner in August, 2000. The owner is honestly trying to resolve a building encroachment problem. No evidence has been found to show indifference by the applicant and/or owner to deliberately or intentionally allow the building encroachment problem(s) to occur. Thank you for your consideration of this request."

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3. It appears the site plans attached to the detailed building construction plans for the building permits to construct both one-story dwellings, water tank improvements, and other required site improvements (e.g. driveway location, cesspool) were reviewed and approved by the Planning Department and affected government agencies.
4. The site plan drawing, drawn to scale, by The Independent Hawaii Surveyors, dated July 24, 2000, identify the location of the dwellings, existing water tanks and related site improvements. Furthermore, the site plan denotes the distances between the respective dwellings and the affected boundary lines.
5. The Real Property Tax Office memorandum dated December 7, 2000, states in part:

“There are no comments at this time”

“Current Remarks: Real Property taxes are paid through December 31, 2000.”
6. The State Department of Health (DOH) memorandum dated December 5, 2000, states:

"We have no objections to the proposed variance application. However, minimum setback requirements for existing wastewater systems need to be maintained."
7. The Department of Public Works (DPW) memorandum dated December 19, 2000, states in part:

"We have reviewed the subject application forwarded by your memo dated November 23, 2000 and oppose the approval of the application for the reason noted below.

Building permits 872207 & 880862 for the subject property were never finalized."

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Note: It appears that building permits (B.P. Nos. 872207 and 880862) were issued to Mr. and Mrs. Jefferson Nance to construct the first dwelling and second (ohana) dwelling on the subject TMK property. Furthermore, it appears that both building permits were closed or finalled by the DPW-Building Division on April 22, 1988 and October 24, 1988, respectively. (Refer to the copy of a DPW-Building Division memorandum, dated March 11, 2000, and, note that other related plumbing and electrical permits were also finalled).

8. Proof of mailing a first and second notice by the applicant was submitted on January 9, 2001. For the record the first notice was mailed on October 30, 2000 and the second notice on December 4, 2000, respectively, by the applicant.

No objections from the surrounding property owners or public was received.

The building encroachment problems were discovered during the sale of the subject property and escrow. The applicant submitted a recent survey map/site plan that identifies the location of the existing dwellings, water tanks and other site improvements. The site plan identifies the distance between portions of the dwelling and open carport and roof eaves from the affected side boundary lines. Portions of a dwelling, water tank, and attendant roof eaves were constructed and encroach into the property's minimum required rear yard and permitted open space requirements. The current owner did not construct the existing building improvements and these encroachment problems were not disclosed when he purchased the property.

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 applicant/owner 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 owner. Alternatives available to the applicant and owner include the following: Removing the existing building encroachments, relocating the dwelling and water tank to fit within the correct building envelope prescribed by the Zoning Code, and other similar design alternatives, etc., would be uneconomical at this time. The removal of the building encroachments and attendant roof eave(s) constructed by the previous owner(s) will disrupt the dwelling and water tank's structural integrity and their relationship between each other; and other site improvements.

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The applicant, on behalf of the current owner, is honestly trying to address and resolve building encroachments that were permitted and constructed on the property by the previous owner(s). No evidence has been found to show indifference or premeditation by the applicant and current owner to deliberately create or intentionally allow the building encroachment problems to occur. According to the applicant-realtor who represents the owner, the building encroachments were discovered when the present owner decided to sell the property and during escrow.

The Planning Department acknowledges there may be other design or building alternatives available to the applicant and owners recited above. However, these design and building alternatives are deemed to be unreasonable at this time and would place excessive demands on the applicant and current owner 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 affected dwelling and adjacent water tank encroachments 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, plumbing and electrical permits did not disclose any building setback irregularities. The applicant and current owner became aware of the encroachment problems during escrow to sell the property. The current owner is trying to resolve building encroachment problems that were not disclosed when he purchased the property. The building encroachments within the respective yards were identified by recent survey map during escrow to sell the property.

The circumstances which permitted the existing building improvements to be built within the rear yard and respective required open spaces are unique. The existing dwelling encroachments have been built within the rear yard. The water tank's location within the rear yard and portions of the permitted second (ohana) dwelling's and attendant roof eaves within the affected side yard and respective open space requirements shown on the applicant's recent site plan became non-conforming after the Zoning Code was ratified in 1999.

The existing and non-conforming building encroachments are not physically and visually obtrusive from 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 that the existing building encroachments within the affected rear yards and non-conforming improvements within the side yards were

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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 all building (plumbing, electrical, etc.) permits issued by the County or other agencies to construct both dwellings, water tanks, and other related site improvements did not discover or identify any irregular building setback problems. Therefore, it is felt that the existing dwelling encroachments into the rear yard and non-conforming location of the permitted second (ohana) dwelling within the affected side yard will not detract from the character of the immediate neighborhood or the subdivision.

The subject variance application was acknowledged by certified letter dated November 23, 2000. Additional time to allow the applicant to address the concerns of the surrounding property owners and study past permit records 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:

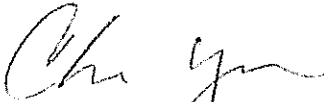
1. The applicant/owner, their assigns or successors shall be responsible for complying with all stated conditions of approval.
2. The applicant/owner, successors or assigns shall indemnify and hold the County of Hawaii harmless from and against any loss, liability, claim, or demand for the property damage, 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 attendant 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 plan submitted with the variance application, dated July 24, 2000 to remain on the subject property.

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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,



CHRISTOPHER J. YUEN
Planning Director

WRY:cps
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xc: Real Property Tax Office