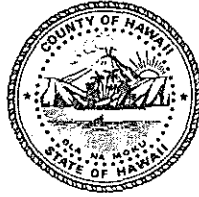


Harry Kim
Mayor



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 2905 2908

June 20, 2001

Mr. Gean Cannon
P. O. Box 164
Holualoa, HI 96725

Dear Mr. Cannon:

VARIANCE PERMIT NO. 1208 (VAR 00-096)

Applicant: GEAN CANNON
Owner: KEKOA J. MAU
Request: Variance from the Minimum Yards,
Pursuant to Chapter 25, Zoning,
Tax Map Key: 7-3-032:017, Lot 172

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. 1208 allows portions of the existing dwelling/deck located on the subject property, pursuant to a site plan dated August 8, 2000, to remain within that affected side yard "AS BUILT" with a minimum side yard of 9.78 to 9.82 feet from that respective side boundary line in lieu of the minimum 10 feet side yard as required by the Zoning Code, Chapter 25, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), and Section 25-5-77, Other regulations.

FINDINGS AND RECOMMENDATION

The Planning Director has concluded that the variance request from the minimum yards should be approved based on the following findings:

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SPECIAL AND UNUSUAL CIRCUMSTANCES

1. The subject property containing 10,220 square feet is Lot 172, Kona Palisade Subdivision, Unit 1, F. P. 1061 at Kalaoa 5th North Kona, Hawaii.

The property is zoned Agricultural (A-5a) by the County and designated Urban "U" by Land Use Commission (LUC). It appears that the subject lot was subdivided or created before the Zoning Code, Chapter 25, of the Hawaii County Code was adopted in 1967. Pursuant to the Zoning Code, the existing lot's average width and land area are below minimum requirements for the A-5a zone, and therefore deemed "non-conforming" with respect to minimum average width and land area.

2. The applicant's detailed written explanation and reasons for requesting a variance is dated November 1, 2000 and states in part:

"The County of Hawaii Real Property Tax Office record show that this property, as improved, was first sold in August 31, 1989 to George D. Rabuska, who resided continuously in the house, until his death on April 6, 2000. During that entire time, no question was raised as to the location of the house on the lot, until the sale to the present owner, who acquired his title in August, 2000. The survey done in course of the sale of the premises to the present owner discloses minor encroachments into ten foot setback on the north property line of the lot."

3. The site plan drawing, drawn to scale, by Donald C. McIntosh, LPLS, dated August 3, 2000, identifies the location of the existing dwelling, attached open carport and other site improvements. The site plan identifies a building envelope and denotes the distances between the respective dwelling and the affected side boundary line.

Note: This site plan identifies the location of existing wall and fencing improvements on the subject property and adjacent property. Any existing and free-standing perimeter walls, fences, and retaining walls, less than six (6) feet in height, respectively; and, located on and within the subject property do not require any building permit(s). However, any existing perimeter wall encroachments or other identified boundary encroachments must be addressed and resolved between the affected parties or between legal property owner(s).

Furthermore, the location of the existing driveway and any existing cesspool or Individual Wastewater System (IWS) located on or within the subject property was not denoted or identified on the site plan submittal.

4. A copy of the original site plan and detailed building construction plans to construct the existing dwelling and site improvements that were approved by the County or and other government agencies were not submitted with the variance application.
5. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated November 1, 2000 stating:

"This is to certify that Kekoa J Mau (Owner-of-record) has paid all real property taxes due the County of Hawaii up to and including 12/31/00."

6. The State Department of Health (DOH) memorandum dated January 5, 2001, states in part:

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

Note: The site plan, dated August 3, 2000, does not denote or identify the location of any existing Individual Wastewater System (IWS) or cesspool.

7. The Department of Public Works (DPW) memorandum dated December 20, 2000, states in part:

"We have reviewed the subject application and offer the following comment:

1. Please refer to the attached Building Division comments dated December 18, 2000.

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

The attached DPW memorandum dated December 18, 2000 includes the following comments or following statements:

"We oppose the approval of the application for the reasons noted below. Building permit 886138 for the subject dwelling was never finalized."

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8. Proof of mailing a first and second notice was submitted to the Planning Department on November 3, 2000 and December 20, 2000, respectively. For the record, it appears that the first and second notice was mailed from Kailua-Kona on November 1, 2000 and December 20, 2000, respectively, by the applicant.

Note: A copy of a public notice with handwritten notes dated December 24, 2000 was received by the Planning Department on January 4, 2001. The copy of the public notice and written comment(s) from "owner Lot 50" and endorsing the listed applications was incorporated into the subject variance file.

The building problems were discovered during the sale of the subject property. The applicant submitted a recent survey map/site plan that identifies the location of the existing dwelling and other site improvements. The site plan identifies the distance between portions of the dwelling and roof eaves "AS BUILT" from the affected side boundary line. Portions of the existing dwelling were constructed and encroach into the respective side yard. It appears the previous and current owner(s) were unaware of the building encroachment problem.

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 current 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 applicant or current owner(s). Alternatives available to the applicant to address and correct the existing building encroachments include the following actions:

- 1) Removing portions of the existing building encroachments to fit within the correct building envelope prescribed by the Zoning Code; and,
- 2) Relocating the dwelling, and/or other similar design alternatives, etc., would be seem unreasonably harsh and uneconomical at this time.

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The applicant, on behalf of the current owner(s), is honestly trying to resolve building encroachments that were built and established on the subject property by the previous owner(s). The removal of the existing building encroachments and attendant roof eave(s) constructed by the previous owner(s) will disrupt the dwelling's/open carport's structural integrity and relationship to and between other existing site improvements. No evidence has been found to show indifference or premeditation by the current applicant/owner(s) to deliberately create or intentionally allow the building encroachment problems to occur.

The Planning Department acknowledges there may be other design or building alternatives available to the applicant and owners beyond those cited 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(s) 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 circulation and exposure to light are available between permitted structure(s) and boundary/property lines. It appears that the existing dwelling and open carport was constructed under valid building permit(s) 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 permit(s) did not disclose any building encroachments or setback irregularities. The applicant and current owner(s) became aware of the encroachment problems during escrow to sell the property. The current owners are trying to resolve building encroachment problems that were disclosed after a modern survey map was presented for escrow purposes.

The circumstances which permitted the existing building improvements to be built on the property are unique. The existing building encroachments have been built within a side yard on a non-conforming sized property.

It appears that existing building encroachments into the affected side yard are not physically and visually obtrusive from adjacent property or existing right-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 within the affected side yard was a building mistake which occurred during construction of the dwelling or misinterpretation of the minimum building yards and boundary line(s) by the previous owner(s). Inspection of the property during the life of the building permit(s) issued by the County or other agencies did not discover any building encroachment or reveal and 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.

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The subject variance application was acknowledged by certified letter dated December 13, 2000. Additional time to allow the Planning Director to understand and address agency comments was required. The applicant agreed to extend the date on which the Planning Director shall render a decision on the subject variance to no later than June 22, 2001.

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(s), 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 will not meet Chapter 25, the Zoning Code's, minimum side yard requirements. The approval of this variance allows the existing and permitted building improvements identified on the site plan submitted with the variance application, dated August 3, 2000 to remain on the subject property. The applicant/owner(s) is/are required to confer with the Department of Public Works (DPW) and close building permit 886138 prior to any future sale or change in property ownership or title.
3. Future building improvements and permitted uses shall be subject to State law and County ordinances and regulations pertaining to building construction and building occupancy.

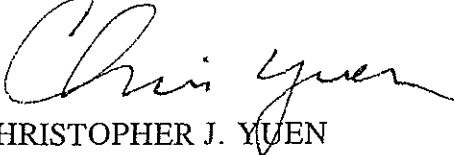
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Should any of the foregoing conditions not be complied with, the Planning Director may proceed to declare this Variance Permit null and void.

Sincerely,



CHRISTOPHER J. YUEN
Planning Director

WRY:cps

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xc: Real Property Tax Office (Kona)
Planning Dept. - Kona Office