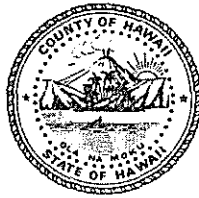


Harry Kim
Mayor



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 2960

June 19, 2001

Gilbert M. Halpern, Esq.
Attorney at Law
465 Haili Street
Hilo, HI 96720-2515

Dear Mr. Halpern:

VARIANCE PERMIT NO. 1203 (VAR 01-030)

Applicant: GILBERT M. HALPERN, ESQ.
Owner: JEANNE FULLER MARTIN
Request: Variance From the Minimum Yards and Permitted
Projections Into Yard and Open Spaces, Pursuant to Chapter
25, Zoning
Tax Map Key: 1-5-043:088, Lot 444

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. 1203 allows a portion of the existing dwelling, deck, and roof eave to remain within the affected side yard and open space "AS BUILT" with a minimum side yard of 17.51 feet and minimum open space of 9.90 feet, more or less, 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.

BACKGROUND

- 1) **Location.** The subject property containing 1.00 acre is Lot 444, Block 7, Land Court Application 1053, Hawaiian Paradise Park Subdivision, Keaau, Puna, Hawaii. The property was zoned Agricultural (A-1a) by the County in 1967. The property's address is 15-1515 18th Street (Maia Street).

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- 2) **Application Date.** The applicant submitted a transmittal letter dated April 9, 2001, variance application form, other attached variance submittals, and \$250.00 filing fee check on April 9, 2001. The applicant's transmittal letter purports that the owner "Ms. Martin had this residence built approximately four (4) years ago". The original or copy(s) of the original approved site plan, detailed building construction plans reviewed by the County and other agencies and a copy of the approved building permit(s) were not submitted with the variance application. The subject variance application was acknowledged by certified letter dated April 30, 2001. For the record, a certified check (#0220329 9 dated May 5, 2001) to replace the original \$250.00 filing fee check (dated March 21, 2001), was received on May 5, 2001.
- 3) **Building Permit.** A building permit (B NO. 960947) was issued to Jeanne Martin (Owner/Builder) on July 16, 1996 by the Department of Public Works (DPW) to construct the existing dwelling, water tank, and other related site improvements. It appears the site plan(s) attached to the detailed building construction plans for the building permit to construct the existing dwelling, water tank, and other related site improvements were reviewed and approved by the Planning Department and other affected government agencies. It appears that the required building inspections were conducted by DPW-Building Division and by representatives from other affected government agencies of all building improvements on the property. B NO. 960947 was closed by the DPW on May 12, 1997.
- 4) **Site Plan.** The site plan or "MAP SHOWING EXISTING CONDITIONS", drawn to scale and dated February 20, 2001, by The Independent Hawaii Surveyors identifies the location of the dwelling, deck, roof eaves, and other related improvements on the subject TMK property. The survey map identifies the location of the building encroachments. Furthermore, the site plan denotes the distances between the respective dwelling encroachments and the affected side boundary line.

For the record, a site inspection by Planning Department staff, was conducted on June 8, 2001 to view the subject building encroachments and adjacent property, and to understand the surrounding topography and view other building improvements. Staff was met at the property by the applicant (Gilbert M. Halpern, Esq.), Mrs. Halpern, and current owner(s).

In addition to photographs taken of the property by the Planning Department staff on June 8, 2001, staff observed that the existing "KENNEL" identified on the applicant's map or site plan, dated February 20, 2001, had been demolished or removed. Furthermore, the site plan does not show existing topography, original natural vegetation, and other introduced planting improvements located on the property.

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- 5) **Applicant's Reasons.** The applicant's transmittal letter, dated April 9, 2001, states in part:

"Enclosed is an Application for Variance from Zoning Code I am submitting for my client, Ms. Jeanne Martin of 15-1515 Maia Street (18th Street), Hawaiian Paradise Park.

Ms. Martin had this residence built approximately four (4) years ago. A survey taken during the current escrow involving this home revealed a side yard setback violation. Apparently, when the contractor constructed this home, he made a siting error in locating the house within the set back boundaries. Hence, a corner of the home extends 2.49 feet into the 20-foot set back (Seen (sic) enclosed copy of Survey Map).

At this time, although the title insurance company involved does not see any problem with this error, the lender is requiring Ms. Martin to obtain a Variance from the County Zoning Code for this setback violation. To this end, I am submitting this application on behalf of Ms. Martin. Upon receiving your written acknowledgement of this application, I will notify the surrounding property owners as required (See enclosed map with list of owners' names, addresses and TMKeys (sic)."

- 6) **Agency Comments.** The following are comments in the subject variance file:
a) The Department of Finance-Real Property Tax memorandum dated May 21, 2001 states in part:

"There are no comments at this time.

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

- b) The State Department of Health (DOH) memorandum, dated May 8, 2001 states:

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

- c) The Department of Public Works (DPW) memorandum dated May 1, 2001, states in part:

"We have no comments or objections to the application."

- 7) **Notice to Surrounding Owners.** The applicant submitted "AFFIDAVIT OF GILBERT M. HALPERN" on May 14, 2001 and May 23, 2001, respectively. It appears that the first notice was mailed on May 5, 2001, and the second notice was mailed on May 19, 2001, respectively.

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- 8) **Comments from Surrounding Owners.** Objection letter(s) and other correspondence to the variance application were received from the surrounding property owners and are part of the variance file. For the record they are:
- a) Handwritten objection letter from Winston Hoshino, dated May 8, 2001, was received by the Planning Department (Hilo) on May 9, 2001.
 - b) Handwritten letter from Mr. and Mrs. James D. Carey (Signed by James D. Carey) requesting further information and attached notice, dated May 5, 2001 which was written by the applicant and addressed to the Carey's, was received by the Planning Department (Hilo) on May 10, 2001.
 - c) Objection letter from Mr. and Mrs. Bruce T. Bliatout, dated May 9, 2001, and attached notice, dated May 5, 2001, which was written by the applicant and addressed to Mr. Bruce Bliatout, et al., was received by the Planning Department (Hilo) on May 14, 2001.
 - d) Handwritten objection letter from Mr. and Mrs. Pancho Sumoba, Sr. (signed by Jayvie Sumoba), dated May 11, 2001, was received by the Planning Department (Hilo) on May 16, 2001.
 - e) Second handwritten objection letter from Winston Hoshino, dated May 30, 2001, was received by the Planning Department (Hilo) on May 31, 2001.
 - f) Objection letter from Jeffrey P. Newman, dated June 4, 2001, was received by the Planning Department (Hilo) on June 6, 2001.
 - g) Original handwritten letter supporting the applicant's request, dated May 17, 2001, together with a notarized statement, written by Francis Hall, was sent to the applicant and submitted for the variance file record by Mr. Halpern on June 8, 2001.

FINDINGS AND CONCLUSIONS

Based on the information provided by the applicant, comments from agencies and surrounding owners, and a site visit, the Planning Director makes the following findings:

Special And Unusual Circumstances

The applicant contends that "when the contractor constructed this home, he made a siting error in locating the house within the set back boundaries". There is no evidence that the applicant

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intentionally instructed the contractor to site the structure in the setback area inconsistent with the approved building permit plans. It appears that the building inspections of the premises, during building construction and throughout the life of the original building permit did not disclose any building setback irregularities within the affected side yard and minimum required open spaces. The applicant and owner became aware of the encroachment problems during escrow to sell the property.

The subject dwelling was sited in relation to the topography. The property or owner most impacted by the subject variance request is the adjoining Lot 445 (TMK: 1-5-043:087). Pursuant to the recent site inspection, in addition to existing natural tree (ohia) vegetation, it appears that the applicant has introduced and planted additional ohia trees and other ground plantings within the affected side yard and open spaces between the dwelling encroachments and the common side boundary line between Lot 444 and Lot 445. The existing natural vegetation and introduced planting materials will act as a landscape buffer between the building encroachments on the subject property "Lot 444" and the common side boundary line shared with the adjacent Lot 445. A variance condition to require the retention and maintenance of these existing landscape improvements established within the affected side yard and open space on the subject TMK property will be imposed to insure that a "a sense of place" and privacy between Lot 444 and Lot 445 are maintained. Furthermore, no enclosure of the open deck encroachment will be permitted.

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 applicant/owner. Alternatives available include the following:

- 1) Remove all encroachments including the corner of the dwelling, and portions of the deck and roof eave that encroach into the setback. This alternative seems unreasonably harsh to cure a 3' encroachment of the building wall where 17' remains between the corner wall and the boundary, especially when balanced against the cost, structural integrity, and design of the dwelling.
- 2) Allow the encroachment of the corner of the building and roof eave, but remove the encroaching portion of the deck. This would be a reasonable alternative if no other alternative existed. However, it seems that no functional gain would be achieved by eliminating the encroaching portion of the deck. The resulting lopped deck would deter

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from the design of the dwelling, yet the views toward the adjoining property from the remaining deck would not differ significantly from the original deck.

- 3) Allow all encroachments conditioned on maintaining a landscaped buffer to screen the views between the adjoining properties along that portion of the boundary where the encroachments occur. This is the most reasonable alternative.

The Planning Department acknowledges there may be other design or building alternatives available to the applicant/owner 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 dwelling, water tank, and other site improvements were constructed under a building permit issued to the applicant.

It is felt that the existing dwelling or building encroachments are not physically and visually obtrusive from the existing adjacent property or visible from the existing rights-of-way. It appears the building encroachments do not depreciate or detract from the character of the surrounding neighborhood, public (church) use, and the existing and surrounding land patterns.

Based on the foregoing, 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.

CONCLUSION

This variance request is approved effective June 8, 2001, 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

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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, deck, 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 plan submitted with the variance application, dated February 20, 2001, to remain on the subject property. The existing landscape improvements and ground cover located immediately adjacent to the building encroachments shall be maintained on the property. No enclosure of the existing covered patio or open deck improvements will be permitted to be enclosed. Additional landscape materials (additional native trees, ohia trees, or the like, additional ground cover, and other similar landscape rock wall/fences improvements) may be introduced and placed within the affected side yard and open spaces adjacent to the building encroachments and within the affected side yard and open spaces to buffer the existing dwelling encroachments from the surrounding property(s). All permitted landscaping materials and related landscaping improvements shall be maintained in a healthy and attractive state.
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/RRT:cps

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xc: Real Property Tax Office
Mr. Winston Hoshino
Mr. and Mrs. James D. Carey
Mr. and Mrs. Bruce T. Bliatout
Mr. and Mrs. Pancho Sumoba, Sr.
Mr. Jeffrey P. Newman