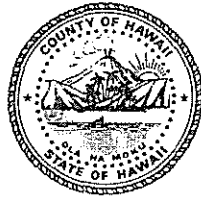


Harry Kim
Mayor



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 2502

July 25, 2001

Mr. Robert Woods
RR #4 Box 2225
Pahoa, HI 96778

Dear Mr. Woods:

VARIANCE PERMIT NO. 1222 (VAR 01-045)

Applicant: ROBERT WOODS

Owners: ROBERT WOODS

**Request: Variance from Minimum Yards,
Pursuant to Chapter 25, the Zoning Code**

Tax Map Key: 1-3-025:044, Lot 2

After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No.1220 allows portions of that existing dwelling that were constructed within the affected side yard to remain, "AS BUILT", pursuant to the applicant's December 15, 2000 site plan. The variance is to allow portions of the existing dwelling to remain with a minimum 8.15 feet side yard in lieu of the minimum 20 feet side yard and allow a minimum 6.69 feet open space between the attendant roof eaves and that side boundary line in lieu of the minimum 14 feet required. The subject variance is from the minimum 20 feet side yard and 14 feet open space requirements pursuant to the Zoning Code, Chapter 25, Article 5, Division 76, Minimum yards, (a), and Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open spaces, respectively.

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Mr. Robert Woods

Page 2

July 25, 2001

BACKGROUND AND FINDINGS

1. **Location.** The subject TMK property, containing 1.040 acres, is Lot 2, Block 8, Leilani Estates, Keahialaka, Puna, Hawaii. The property is also commonly described as TMK: 1-3-025:044, Lot 2. The property is zoned Agricultural (A-1a) and is designated Agriculture "A" by the State Land Use Commission
2. **Application.** The applicants submitted the variance application form, supplemental information, tax clearance, and \$250.00 filing fee check on May 18, 2001.
3. **Site Plan.** The applicant's map or site plan drawing, drawn to scale and dated December 15, 2000, was surveyed and prepared by Niels Christensen, LPLS. The site plan denotes and identifies the existing dwelling, dwelling encroachments within a side yard, shed, and other encroachments as of December 15, 2001. The site plan denotes and identifies the building envelope using a series of "broken" or "dashed" line(s) prescribed by the Hawaii County Zoning Code. Portions of the existing dwelling and roof eaves have been constructed into the 20 feet wide side yard and minimum 14 feet open space requirements and do not comply with minimum yards of the County Zoning Code.

The site plan drawing, dated December 15, 2000, also denote and identifies the location of the existing "UNPAVED DRIVE" access driveway and show "ADJOINER'S WATER TANK" straddles a common side boundary line between Lot 1 and the subject TMK property.

The access to the subject TMK property and the tank encroachments shall be resolved by the applicant or between respective property owner(s).

4. **Building Permit(s).** A copy of the original building permit(s)-BP 840404 and associated County approved detailed building construction plans to construct the dwelling and other necessary site improvements in 1984 were not submitted with the applicant's variance application. (The site plan dated December 15, 2000 shall not be interpreted or construed to imply that other site improvements denoted and located on the site plan were constructed or permitted under BP 840404 opened on March 2, 1984 by the County-DPW).

5. **Agency Comments and Requirements.**

- a. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated May 4, 2001 states in part the following:

"TMK(s): 3-1-3-025-044-0000"

"This is to certify that the real property taxes due to the County of Hawaii on the parcel(s) listed above have been paid up to and including June 30, 2001.

This clearance was requested on behalf of Stanley L. Keller for the County Planning Department and is issued for this/these parcel(s) only."

- b. The State Department of Health (DOH) memorandum dated June 4, 2001, in the subject variance file states in part:

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

- c. The Department of Public Works (DPW) memorandum dated June 7, 2001, states in part:

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

1. Buildings shall conform to all requirements of code and statutes pertaining to building construction, (see attached memorandum from our Building Division).
2. Road "A", fronting the subject property, is a private roadway."

The attached DPW-Building Division memorandum dated May 30, 2001, states in part:

"We oppose the approval of the application for the reasons noted below.

Building permit 840404 for the subject dwelling was never finalized.

Others: Permit EH70018-filed no status. Plumbing permit is required."

Mr. Robert Woods

Page 4

July 25, 2001

6. **Notice to Surrounding Owners.** Proof of mailing a first and second notice(s) were received by the Planning Department on May 29, 2001 and June 5, 2001, respectively.
7. **Comments from Surrounding Property Owners or Public.** One objection call was received on June 12, 2001 from Mrs. Barbara Nelson representing Seb Gertmenian and an objection letter from Seb A. Gertmenian was received on June 27, 2001.

SPECIAL AND UNUSUAL CIRCUMSTANCES

In consideration of the applicant's submittals and findings above, it appears that portions and attendant roof eaves of the dwelling built on the subject TMK property started in 1984, approximately 17 years ago, encroach into the subject TMK property's side yard. The encroachments were built within the subject TMK property's "south" side yard. The bulk of the dwelling or remaining living area of dwelling and attendant roof eaves meet the minimum yard and open space requirements.

The applicant submitted a recent survey map/site plan and written report by a surveyor that identifies the location of the existing dwelling's encroachments within that affected side yard. The site plan denotes and identifies distances between portions of the dwelling's (corners) wall and attendant roof eaves from that side yard boundary line. It appears that portions of the dwelling have been constructed nearly 11.85 feet into one of the property's side yards, and the corresponding open space shown is 6.69 feet. It appears the applicant or current owner(s) were unaware of the severity of the encroachments and discovered other unresolved permit issues after they purchased the property.

Therefore, considering the applicant's submittals, findings, and circumstances, it is felt there are special or unusual circumstances applying to the subject property which exist either to a degree which deprives the applicants of substantial property rights that would otherwise be available, or to a degree which obviously interferes with the current and best use of the subject property.

ALTERNATIVES

At this time there are no reasonable alternatives in resolving the difficulty of the applicant or current owner. Alternatives available to the applicant or owner to address and correct the existing building encroachments include the following actions:

Mr. Robert Woods

Page 5

July 25, 2001

1. Remove the improvements and attendant roof eaves that encroach into the affected side yard.
2. Redesign and relocate the existing dwelling to fit within the building envelope prescribed by the Zoning Code and other design and remedial building alternatives.

To require or impose removal of all the encroachments and modifying the attendant roof eave(s) would seem unreasonably harsh and uneconomical at this time. The removal of the building encroachments or relocation of these existing improvements may disrupt the dwelling's structural integrity, change internal room lighting and air circulation, and change the building's overall building geometry and exterior character.

No evidence has been found to show indifference or premeditation by the applicant or current owner(s) to deliberately ignore or intentionally allow the building encroachment problems to occur. The applicant submitted the variance application to address and resolve the dwelling's encroachment problem within the affected side. Furthermore, any non-permitted building improvements ("ADJOINER'S WATER TANK") and other access driveway issues denoted on the applicant's site plan submittal and built within the adjacent TMK property's will be removed or addressed and resolved between respective property owners.

The Planning Department acknowledges there may be other design or building alternatives available to the applicant and owner 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 applicants and current owners when a more reasonable alternative is available by the granting of the subject variance request.

Note: The existing driveway denoted on the site plan may not have required any driveway permit from the DPW. However, the existing or adjoiner's water tank straddling a common side boundary line should be addressed by the applicant or between respective owners. The subject variance request is limited to dwelling encroachments within the side yard which are identified on the applicant's site plan dated December 15, 2000 and does not include or address the tank or other driveway encroachment issues.

Mr. Robert Woods

Page 6

July 25, 2001

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 was constructed under a single building permit issued to David Thomas, by the County. The building permit issued by the DPW-Building Division to construct the dwelling were closed by the DPW-Building Division on August 5, 1993. The applicant and current owners are trying to resolve building encroachment problems that were disclosed after a modern survey of the existing property was performed and a map of existing conditions was prepared.

The circumstances to allow and permit the existing building and dwelling encroachments to be built and remain within that affected rear yard over 17 years ago are unique. Furthermore, the dwelling encroachments have been built within a side yard on property that appears that exhibits a sloping nature.

It appears that the commencement of building activity and the dwelling encroachments built into or within that affected side yard in 1989 were not perceptible and not physically and visually obtrusive from adjacent TMK property(s) or the rights-of-way. It appears the 17 year old + dwelling encroachments do not depreciate or detract from the character of the surrounding neighborhood and the existing and surrounding land patterns. It appears the existing encroachment(s) within the affected rear yard was the previous owner(s) builder's mistake which began in 1984 or a misinterpretation of the minimum building yards or boundary line(s) by the owners or builder. Therefore, it is felt that the existing dwelling encroachments within that side yard will not detract from the character of the immediate neighborhood or other surrounding property within the subdivision.

The subject variance application was acknowledged by certified letter dated May 23, 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.

VARIANCE DECISION AND CONDITIONS

The variance request is approved subject to the following conditions:

1. The applicant/owner(s), 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 and open space requirements. The approval of this variance allows the permitted dwelling identified on the site plan submitted with the variance application, dated December 15, 2000 to remain on the subject TMK property.
 - 3a) The applicant or owner(s) shall confer with the DPW-Building Division and remove those unprompted portions of the dwelling within the subject TMK property identified on the variance application's site plan dated December 15, 2000.
 - 3b) The applicant or owner(s) shall confer with the DPW-Engineering Division to address and resolve the adjoiner's water tank constructed upon the common side boundary line and other encroachments issues.

The applicant shall address and satisfy 3a and shall submit proof by way of a letter or memorandum from the DPW-Building Division, to the Hawaii County Planning Department on or before December 31, 2001, that the access driveway has been relocated and that BP 840404 has been finaled or closed.
4. The applicant shall address Condition No. 3a before the applicant or current owner submits any further building plans and building permit application(s) for review and approval. Future building improvements and permitted uses on the subject TMK property shall be subject to State law and County ordinances and regulations pertaining to building construction and building occupancy.

Mr. Robert Woods

Page 8

July 25, 2001

5. No ohana permit shall be granted to allow an ohana dwelling on the subject TMK property and no building permit(s) shall be issued to allow an ohana dwelling unit or second dwelling unit to be constructed or established on the subject TMK property.

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

PAWP60WRY\FORMLETTVARAPPTMK13025044.WOOD

xc: Real Property Tax Office
Mr. Seb A. Gertmenian