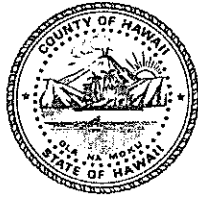


Harry Kim
Mayor



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 2250

August 10, 2001

Ms. Robyn J. Kam-Malczon
c/o CENTURY 21
586 Kanoelehua Avenue
Hilo, HI 96720

Dear Ms. Kam-Malczon:

VARIANCE PERMIT NO. 1227 (VAR 01-046)

Applicant: ROBYN J. KAM-MALCZON

Owner: SHELLY ANN CANDAROMA

Request: Variance from Minimum Yards

Pursuant to Chapter 25, the Zoning Code

Tax Map Key: 2-5-052:017, Lot 17

After reviewing the subject application, background, and finding, the Planning Director certifies the approval of your variance request subject to variance conditions. Variance Permit No. 1227 allows portions of the dwelling and carport constructed within a front yard to remain, "AS BUILT", pursuant to the applicant's site plan dated March 14, 2001. The variance allows the dwelling encroachments within the minimum 20 feet front yard to remain with a building setback of between 18.72 to 20.00 feet from the front boundary line. The variance is from the minimum 20 feet front requirement, pursuant to the Zoning Code, Chapter 25, Article 5, Division 7, Section 25-5-7, Minimum yards, (a) (2) (A).

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BACKGROUND AND FINDINGS

1. **Location.** Lot 17, containing 10,271 square feet, is situated within the "Luana Gardens Subdivision", File Plan 1285, at Ponahawai, South Hilo, Hawaii. The subject property is commonly referred or described using its tax map key (TMK) number: "TMK: (3) 2-5-052:017, Lot 17". The subject TMK property is zoned Single-Family Residential (RS-10) and designated Urban "U" by the State Land Use Commission.
2. **Application.** The applicant submitted the variance application form, supplemental information, tax clearance, and \$250.00 filing fee check on May 30, 2001.
3. **Site Plan.** The applicant's map or site plan drawing is drawn to scale and dated March 14, 2001. The survey and the site plan was signed by Niels Christensen, LPLS of The Independent Hawaii Surveyors. The site plan denotes and identifies the existing dwelling encroachments along and within the property's front yard along Luana Way. The site plan identifies other building improvements and the building envelope prescribed by the Hawaii County Zoning Code. Portions of the existing dwelling were constructed within the respective front yard. According to the applicant's site plan, the dwelling, encroaches up to 1.28 feet into the property's front yard.

For the record, the applicant's site plan does not denote or identify the location of an existing cesspool or other Independent Wastewater System (IWS) within or upon Lot 17.
4. **Building Permit(s).** A copy of the original building permit-BP H56816 and associated County approved detailed building construction plans to construct the dwelling and other necessary site improvements in 1973 were not submitted with the applicant's variance application.

5. **Agency Comments and Requirements.**

- a. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated April 23, 2001 states in part the following:

"TMK(s): 3-2-5-052-017-0000"

"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."

- b. The State Department of Health (DOH) memorandum dated July 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."

- c. The Department of Public Works (DPW-Engineering Division) memorandum dated July 18, 2001, states in part:

"We have reviewed the subject application and our comments are as follows:

- i. Buildings shall conform to all requirements of code and statutes pertaining to building construction, (see attached memorandum from our Building Division)."

The attached Department of Public Works (DPW-Building Division) memorandum dated June 28, 2001, states in part:

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

Permits H56816 & MH19946 for the subject property were never finalized."

6. **Notice to Surrounding Owners.** The applicant submitted a mailing list and addresses of property owners and affixed mail receipt(s) on June 4, 2001 and July 11, 2001, respectively.
7. **Comments from Surrounding Property Owners or Public.** No written comments or objection letters were received.

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SPECIAL AND UNUSUAL CIRCUMSTANCES

In consideration of the applicant's submittals and findings above, it appears that portions of the existing dwelling built in 1973, encroach into the respective front yard of the subject TMK property. It appears that the building encroachment amounts to no more than 29.0 square feet +/- of the dwelling's overall living area. The bulk of the dwelling, attached carport, and attendant roof eaves are within the building envelope prescribed by the Zoning Code and meet the minimum yard(s) and open space requirements.

The applicant submitted a recent survey map/site plan prepared by a surveyor and dated March 14, 2001 which identifies the location of the building encroachments within the affected front yard. The site plan denotes and identifies distances between the dwelling's wall and attendant roof eaves from the respective front boundary line. The base of the triangular encroachment or wall/living area of the dwelling was inadvertently built approximately 1.3 feet +/- into a front yard. The triangular shaped encroachment amounts to no more than 29.0 square feet +/- . It appears that the previous and current owner(s) were unaware of the building encroachment problem and permit issues until the survey was performed.

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

1. Remove the dwelling encroachments and modify attendant roof eaves within the respective front yard.
2. Redesign and relocate the existing dwelling and carport to fit within the building envelope prescribed by the Zoning Code and other design and remedial building alternatives.

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To require or impose removal of the dwelling's 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 the existing improvements may disrupt the dwelling and carport'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 past/current owner(s) to deliberately build 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 yard(s).

The Planning Department acknowledges there may be other design or building alternatives available to the applicants 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 owners 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 was constructed under a building permit issued to previous owner(s) by the County. It appears that the building inspections of the premises, during building construction, and throughout the life of the building permit did not disclose any encroachments into the affected yards or any other building irregularities. County permit records indicate that building permit (H56816) was closed by the DPW-Building Division and per following remark: "FINAL INSPECTION APPROVED, NO DATE BY INSPECTOR". The applicant and current owners are trying to resolve building encroachment problems that were disclosed after a modern survey of the existing TMK property was performed and a map of existing TMK property was prepared.

The circumstances to allow and permit the existing building and dwelling encroachments to be built within that affected yard(s) and rear yard open space over 28 years ago are unique.

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It appears that the commencement of building activity and the dwelling encroachments built into or within that affected yard(s) in 1973 were not perceptible and not physically and visually obtrusive from adjacent TMK property(s) or the rights-of-way. It appears the 28 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 yards was a contractor or builder's mistake which occurred in 1973 or a misinterpretation of the minimum building yards or boundary line(s) by the previous owner or owner's builder. Inspection of the TMK property during the life of the building, electrical, and mechanical permits did not discover any dwelling encroachment problem or reveal and disclose any irregular building problems. Therefore, it is felt that the existing dwelling and carport encroachments within the respective side yard(s) and rear yard(s) will not detract from the character of the immediate neighborhood or other surrounding property within the subdivision.

The subject variance application was acknowledged by letter dated June 25, 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:

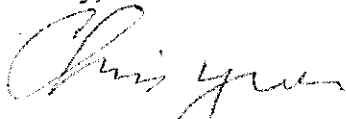
1. The applicant/owner(s), their assigns or successors shall be responsible for complying with all stated conditions of approval.
2. The applicant/owner(s), successors or assigns shall indemnify and hold the County of Hawaii harmless from and against any loss, liability, claim, or demand for the property 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.

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3. Portions of the existing dwelling encroach within the property's minimum front yard, pursuant to Chapter 25, the Zoning Code. The approval of the applicant's variance request acknowledges the location of the existing dwelling encroachments and permits the dwelling, attached carport, and attendant roof eaves shown the variance application's site plan, dated March 14, 2001, to remain, "AS BUILT".
4. The applicant and current owner(s) shall address the DPW-Building Division comment dated June 28, 2001 and close any outstanding building or construction permits (H56816 and MH19946) before the property is sold or property title is transferred or changed.
5. Future building additions or further building improvements upon the subject TMK property shall be subject to State law and County ordinances and regulations pertaining to building construction and building occupancy.
6. 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 variance conditions not be satisfied or 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
DPW-Building Division