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

November 9, 2001

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

Dear Mr. Halpern:

VARIANCE PERMIT NO. 1236 (VAR 01-061)
Applicant: GILBERT M. HALPERN, ESQ.
Owners: RICHARD TURCHI, ET AL.
Request: Variance From the Minimum Yards and Permitted Projections Into Yard and Open Spaces, Pursuant to Chapter 25, Zoning,
Tax Map Key: 1-5-021:174, Lot 1237

After reviewing your variance application and submittals, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No. 1236 allows portions of the dwelling/carport and the basketball post/backboard, to remain, "AS BUILT", with a minimum side yard of 10.09 feet side yard and minimum open space of 10.09 feet and basketball post/backboard with a minimum 2.92 feet side yard open space within one of the property's "southeast" side yard boundary line, respectively, 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 AND FINDINGS

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.

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2. **Application.** The applicant submitted the variance request, variance application, supplemental information, tax clearance form, and $250 variance filing fee on August 10, 2001.

3. **Site Plan**. The variance site plan or "MAP SHOWING EXISTING CONDITIONS", drawn to scale and dated June 15, 2001, by The Independent Hawaii Surveyors identifies the location of the dwelling, carport, roof eaves, basketball post, etc. and other existing "as built" building improvements on the subject TMK property. The survey map and accompanying description describes existing encroachments and denotes the distance between the carport and basketball post encroachments and affected side boundary line. Furthermore, the site plan identifies the location of a "lattice fence" near and along the affected side "southeast" boundary line.

4. **Building Permit(s)**. County records indicate the following building and related construction permits were issued by the Department of Public Works (DPW):

   BP No. 911071, E911379, and M910993, and M9220188.

   It appears that all permits were closed or "finaled" by the DPW.

5. **Agency Comments and Requirements.**

   a. The Real Property Tax Clearance dated July 12, 2001 submitted by the applicant states in part:

      "TMK(s): 3-1-5-021-174-0000

      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 DEAN, BRUCE D. and KAREN LEE for the County Planning Department and is issued for this/these parcel(s) only."

   b. The State Department of Health (DOH) memorandum dated August 29, 2001, in the subject variance file 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)-Building Division's memorandum dated September 5, 2001, states in part:

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

d. The DPW, Engineering Division's memorandum dated September 20, 2001, states in part:

"We have reviewed the subject application forwarded by your memo dated August 21, 2001 and have no comments or objections to the request."

6. **Notice to Surrounding Owners.** The applicant submitted "ATTORNEY'S AFFIDAVIT OF MAILING RELATIVE TO FIRST NOTICE TO ADJOINING LAND OWNERS" on August 31, 2001 and "ATTORNEY'S AFFIDAVIT OF MAILING RELATIVE TO SECOND NOTICE TO ADJOINING LAND OWNERS" on September 10, 2001, respectively. It appears that the first notice was mailed on August 24, 2001, and the second notice was mailed on September 10, 2001, respectively.

7. **Comments from Surrounding Property Owners or Public.** No objections to the applicant's subject variance application were received from the surrounding property owners.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant submitted a survey map/site plan, drawn to scale and dated June 15, 2001, which identifies the location of the existing dwelling and other site improvements that have been built and established within a side yard. This map, drawn to scale, identifies the location of the existing dwelling, carport, and "basketball post"/backboard improvements and the respective distances between said improvements and the affected "southeast" side boundary line. Portions or a corner of the carport and basketball/backboard were constructed within the affected side yard and respective open space requirements. The applicant contends the "when the contractor constructed this home, he made a siting error in locating the house within the set back boundaries".

Therefore, considering the foregoing facts, applicant's representations, and circumstances, it is f

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

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

1. Remove portions of the existing carport encroachment within the "southeast" side yard. And, the removal or relocation of the basketball post is not desirable by the current owners.

2. Redesign and relocate the existing dwelling, carport, and basketball post to fit within the building envelope prescribe by the Zoning Code and other design and remedial building alternatives.

3. Consolidate the subject TMK property, Lot 1237 with the adjacent TMK parcel, Lot 1238, and resubdivide the resultant bulk parcel area back into 2-like areas and shift or adjust common side boundary lines accordingly to meet minimum building lines and minimum side yard requirements.

To require or impose removal of the respective carport encroachment and relocation of the basketball post would seem unreasonably harsh and uneconomical at this time. The removal of the building encroachment or relocation of these existing improvements may disrupt the dwelling or carport's structural integrity, change lighting and air circulation between the dwelling and the carport, and change the building's overall building geometry and exterior building character. The consolidation and subdivision option, pursuant to Chapter, Subdivisions, Section 23-7, was not considered and pursued by the applicant and respective owners.

The applicant, on behalf of the current owners, is trying to resolve encroachment problems that were built and established within the affected "southeast"side yard by previous owner's contractor or builder. No evidence has been found to show indifference or premeditation by the previous and current owners to deliberately or intentionally allow or create the encroachment problems.

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 previous owner. It appears that the building inspections of the premises, during throughout the life of the original building permit and related construction permits did not disclose any building setback irregularities within the affected side yard and minimum required open spaces. The applicant and current owners became aware of the encroachment problems during escrow to sell the property.

The circumstances which permitted the existing building improvements to be built on the property are unique. The existing building encroachments have been built within one of the two side yards. A variance condition to require the retention and maintenance of an exiting buffer and 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 issues between "LOT 1238" and subject TMK property, "LOT 1237, are maintained. Furthermore, no enclosure of the carport encroachment will be permitted.

It is felt that the existing dwelling or other encroachments are not physically and visually obtrusive from the existing adjacent property "LOT 1238"or visible from the existing right-of-way (22$^{ND.}$ STREET). It appears the building encroachments do not depreciate or detract from the character of the surrounding neighborhood and the existing and surrounding land patterns. It appears the existing encroachments on the property and within the affected side yard were the result of mapping and building discrepancies or misinterpretation of the minimum yards during building construction by the person or persons (contractor) hired by the previous owner. Inspection of the property during the life of the building permit by government agencies did not discover any building encroachment or disclose any irregular building setback problems. The 8 year old building encroachment(s) within the affected side yard were discovered during escrow and after a modern survey map was preformed/prepared. It appears that the previous owners constructed a "lattice fence" within the affected side yard and open spaces to act as a buffer to insure privacy. Therefore, it is felt that the existing carport and location of the basketball post will not detract from the character of the immediate neighborhood or the subdivision.

The subject variance application was acknowledged by certified letter dated August 21, 2001. Additional time to study building permits issued to the previous owner and the applicant's

narrative was necessary.

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

This 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/carport and the basketball post/backboard constructed within a side yard will not meet minimum side yard and minimum side yard open requirements required by the Chapter 25, the Zoning Code. The approval of this variance allows the portions of the existing dwelling/carport and basketball post/backboard building encroachments identified on the variance application's site plan map, dated June 15, 2001, to remain, "AS BUILT", on the subject TMK property.

4. The existing "Lattice Fence", ground cover, and landscape materials planted and located immediately adjacent to the building encroachments shall be maintained on and within the property. 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.

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

   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

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cc: Real Property Tax Office