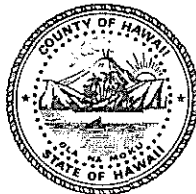


Harry Kim
Mayor



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

September 4, 2002

Mr. Matt Bergey
75-6138 Alii Drive
Kailua-Kona, HI 96740

Dear Mr. Bergey:

VARIANCE PERMIT NO. 1307 WH (VAR 01-063)

Applicant: MATT BERGEY
Owner: MATT BERGEY
**Request: Variance from Minimum Yards,
Pursuant to Chapter 25, Zoning**
Tax Map Key: 7-7-004:073, Lot 11

After reviewing your application, site plan, and the information submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No. 1307 allows portions of a farm dwelling building and garage (accessory) building being constructed on the subject TMK property to remain, "AS BUILT" according to the variance application's site plan dated July 20, 2001. The farm dwelling and detached garage are situated 18.0 feet and between 15.2 feet to 15.6 feet from the "makai" side property line, respectively, in lieu of the minimum 20 feet side yards required. The variance request is from the property's minimum side yard and minimum side yard open space requirements, pursuant to the Zoning Code, Chapter 25, Article 5, Division 7, Section 25-5-76, Minimum yards.

BACKGROUND AND FINDINGS

1. **Property Description and Location.** The subject property is Lot 11 of Ho'omalulu on Alii, Increment I, Phase II, being portions of Grant 1157 to Paakea and Land Commission Award 9971, Apana 28 to W. P. Leleiohoku, and is situated at Kaumalumu and Pahoehoe 1st, North Kona, Hawaii.

The property is zoned Agricultural (A-5a) by the County and designated Agriculture "A" by Land Use Commission (LUC).

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2. **Variance Application-Variance Application Site Plan.** . The applicant/owner submitted the variance application, site plan, supplemental information, tax clearance, and \$250.00 filing fee. The applicant's map or "AS-BUILT" site plan drawing, drawn to scale, was surveyed and prepared by Wes Thomas Associates. The revised site plan, dated July 20, 2001, identifies the location of existing farm dwelling(s), garage(s) (accessory buildings) and other proposed site improvements. The site plan does not identify the building line or building setback line or area where buildings or structures may not be built. The applicant acknowledges that portions of a farm dwelling and accessory building-garage being constructed on the property encroach into one of the property's minimum side yards.

Note: Pursuant to site inspections by the Planning Department staff, we note rock walls along existing easements and side boundary lines are being constructed or proposed. Retaining and boundary Concrete Rock Masonry (CRM) walls less than 6'-high may be allowed on the property without any further building permit(s) subject to agency review and requirements.

The site plan denotes the location of Individual Wastewater System(s) (IWS) or 2-septic systems within the property.

5. **Agency Comments and Requirements-WH (VAR 01-063):**

- a. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated August 18, 2001 states in part:

"TMK(s) (3) 7-7-4-73"

"This is to certify that Mathew Bergey (owner of record) has paid all Real Property Taxes due the County of Hawaii up to and including 6/30/ 01."

- b. The State Department of Health (DOH) memorandum dated August 29, 2001, states in part:

"The Health Department found no environmental health concerns with regulatory implications in the submittals."

- c. The Department of Public Works (DPW) memorandum dated September 5, 2001 states in part:

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

Please refer to the attached Building Division comments dated August 30, 2001.

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

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

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

Permits 005433, 005931, M000816, M000817, E006232, E006233, E006233, E015279 & E015280 for the subject property were never finalized."

6. **Notice to Surrounding Property Owners.** Proof of mailing a first and second notice was submitted to the Planning Department. It appears that the notices were mailed on or about August 15, 2001 and September 10, 2001, respectively, by the applicant.
7. **Comments from Surrounding Property Owners or Public.** The following letters and comments regarding the subject variance application were received:
 - a. Support letter dated August 27, 2002 from Nohona Partners, LLC (Jon Gomes).
 - b. Objection letter dated August 23, 2001 from Wahia Kai Ranch (Paul Faringer, MC). Note: Adjoining property owner-Lot 10.
 - c. Objection letter dated September 3, 2001 from Nancy and William Taylor.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant-owner is trying to resolve building position issues created misinterpretation of boundary pins or misplacement of boundary pins. The variance site plan map was prepared by a registered surveyor showing the location of permitted building improvements. The applicant became aware of the encroachment issues after another survey of the premises was completed after the building permits were issued by the County. The misinterpretation of boundary corners and common boundary lines created the encroachment issues. According to information provided by the applicant's father, the boundary lines were incorrect and the encroachment issues were discovered after a revised survey was completed.

Therefore, considering the variance background information provided by the applicant and other 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 and 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 applicant or owner. Alternatives available to the applicant or lessee (owner) to address and correct the existing building encroachments include the following actions:

1. Remove the dwelling foundations and other building improvements within the affected side yard.
2. Redesign and relocate the dwelling, garage, and other improvements to fit within the correct building envelope prescribed by the Zoning Code and/or other design and remedial building alternatives.
3. Consolidate Lot 11 with Lot 10 and resubdivide the resultant lot to modify the property geometry and/or change the metes and bounds descriptions in accordance with the minimum yard requirements of the Zoning Code.

To require or impose removal of the encroachments or modification of the dwelling improvements would seem unreasonably harsh and uneconomical at this time. The option to acquire and consolidate a portion Lot 11 with adjoining lots and resubdivide pursuant to Chapter 23, Subdivisions, was not addressed or considered by the applicant or owner.

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The applicant is addressing the dwelling and garage location with respect to the boundary line at the time of staking the building foundations and relied on boundary pin location at the time of issuance of the building permit(s). No evidence has been found to show indifference or premeditation by the current applicant and owner to deliberately encroach into the affected side yard or exceed the property's building envelope.

The Planning Department acknowledges there may be other design or building alternatives available to the applicant or 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 applicant or 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 existing or permitted structure(s) and boundary/property lines. It appears that the recent building improvements are being constructed under a series of active building permit issued by the DPW-Building Division in Kona. The respective farm dwelling and garage foundations were established using the boundary pins. It appears that the applicant, owner(s) or permittees were not aware of the subdivision's history or boundary pin location(s) until another survey was performed by the current owner(s). In view of the recent survey map, the applicant or owners are trying to address and encroachment issues and problems due to the "misplacement" or misinterpretation of the boundary pins.

It appears that these encroachments into the affected side yard were not known until a recent map was drawn of the property. The existing encroachments into the side yard are not physically and visually obtrusive from adjacent property or visible from the private road easement(s) and nearest public right(s)-of-way. It appears that the recent building improvements will not depreciate or change the surrounding residential uses and arid-pastoral feeling of the area. The dwelling and garage location will not depreciate or change the character of the surrounding neighborhood and surrounding land patterns. Therefore, it is felt that the dwelling and garage's "AS-BUILT" location will not detract or change the character of the immediate neighborhood or the subdivision.

The variance application was acknowledged by certified letter dated August 21, 2001. Additional time to allow the Planning Director to consider the circumstances and surrounding comments received was necessary. The applicant, on behalf of the owners agreed to an extension of time to September 6, 2002 to render a decision on the subject variance request.

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.

PLANNING DIRECTOR'S DECISION AND VARIANCE 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 an existing farm dwelling and the attendant garage building encroach into one of Lot 11's side yards. The approval of this variance acknowledges the dwelling's slab location and appurtenant garage building, "AS BUILT", and permits these building improvements to be constructed in accordance with approved building permits issued by the DPW-Building Division.
4. The applicant shall contact the DPW-Building Division (Kona) to address the outstanding building permit(s) and construction permits issued to the TMK property or secure any building permits to allow the building improvements identified on the variance application's revised site plan dated July 20, 2001. Building permits issued to the subject TMK property shall be "finaled" or closed by the DPW-Building Division prior to any change in property title or sale of the property.

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5. Required CRM Wall: The applicant shall construct and maintain Concrete Rock Masonry (CRM) wall (320' + in length-less than 6'-0" in height from the property's finished grade) on the subject TMK property and along the subject property's "makai" side boundary line or common side boundary line shared between subject TMK property-Lot 11 and adjoining TMK property-Lot 10. The required CRM wall shall be constructed under the supervision of a certified mason and constructed in "craftsmanship like" manner consistent with other existing CRM walls on the subject TMK property or CRM walls within the immediate subdivision. The required CRM wall shall be constructed and completed prior to or on September 30, 2003.
6. Required Landscaping: Appropriate landscaping materials shall be planted and established on Lot 11 between the CRM wall and the affected dwelling and garage building improvements to buffer or screen building masses from any future building(s) and permitted uses on adjoining property-Lot 10. The landscaping materials shall be planted and established on Lot 11 prior to or on December 31, 2003.
7. 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.

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 - Kona
Planning Dept. - Kona
Zoning Inspector-Jeff Darrow
Paul Faringer (Copy/BOA Form)
Nancy and William Taylor (Copy/BOA Form)