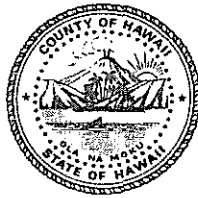


Harry Kim
Mayor



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

May 1, 2002

Mr. Thomas A. Williams
884 A Kupulau Street
Hilo, HI 96720

Dear Mr. Williams:

VARIANCE PERMIT NO. 1279 (VAR 01-079)

Applicant: THOMAS A. WILLIAMS
Owners: RICHARD D. ENGLE, ET AL.
Request: Variance from Minimum Yards and
Open Space Requirements,
Pursuant to Chapter 25, the Zoning Code
Tax Map Key: 1-6-009:021, Lot 30

After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request subject to conditions stated herein. Variance Permit No. 1279 allows portions of the dwelling and open lanai located within a side yard to remain on the property, "AS BUILT", according to applicant's site plan dated May 14, 2001. Portions of the 2-story dwelling encroach a maximum 1.4 feet into a minimum twenty (20) feet side yard. The lanai and respective roof eaves encroach a maximum 2.3 feet into the minimum fourteen (14) feet side yard open space requirement. The variance is from the property's minimum yards pursuant to the Zoning Code, Chapter 25, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), and Section 25-4-44, Permitted projections into yards and open spaces.

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BACKGROUND AND FINDINGS

1. **Location and Zoning.** The subject property, Lot 30 containing 2.00 acres, is within Block C-C-C of the Orchid Land Subdivision, Land Court Application 1053 (Map 53), and is situated at Keaau, Puna, Hawaii.

The subject TMK property is zoned Agricultural (A-3a) and designated Agriculture "A" 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 October 31, 2001.
3. **Site Plan.** The applicant's map or site plan drawing, drawn to scale and dated May 14, 2001 was surveyed and prepared by Ronaldo B. Aurelio, LPLS. The site plan denotes and identifies the existing dwelling and lanai within the affected side yard, respective side yard open yard spaces, and identifies the location of the existing water tank. The site plan identifies the building envelope prescribed by the Hawaii County Zoning Code.
4. **Building Permit(s).** According to county records, all DPW building permits (BP No(s). 811136, 821904, and 882459) issued to allow the building improvements on the subject TMK property were closed by the DPW-Building Division.
5. **Agency Comments and Requirements (VAR 01-079).**

- a. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated October 31, 2001 states in part the following:

"TMK (3) 1-6-009-021-0000."

"This is to certify that ENGLE, RICHARD D/MARSHA (owner-of-record) has paid their real property taxes for the tax period as indicated below. Therefore, there are no taxes owing the County of Hawaii for the above-referenced parcel(s). **Effective till December 31, 2001.**

This Real Property Tax Clearance was requested by Thomas Williams for the County Planning Department use and is issued for this/these parcel(s) only."

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The Department of Finance-Real Property Tax memorandum dated December 5, 2001 states in part:

“Comments for the Appraisal Section:
There are no comments at this time.”

“Comments from the collection section:
Current
Remarks: Real Property taxes are paid through December 31, 2001.”

- b. The State Department of Health (DOH) memorandum dated December 13, 2001, states:

"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 December 17, 2001, states:

"We have reviewed the subject application forwarded by your memo dated December 4, 2001 and have no comments or objections to the request."

6. **Notice to Surrounding Owners.** The applicant submitted proof of mailing a first notice on October 31, 2001 and letter dated January 22, 2002 concerning the second notice. It appears that the applicant mailed the first and second notice(s) on October 30, 2001 and June 15, 2001 and January 22, 2002, respectively.
7. **Comments from Surrounding Property Owners or Public.** No oral or 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/lanai were originally inadvertently constructed within the minimum 20 feet side yard and attendant minimum 14 feet side yard open space requirements for Lot 30 according to Chapter 25, the Zoning Code. The 23 year old building (dwelling/lanai) encroachments were inadvertently constructed by the previous owner(s) or builders into the affected side yard circa 1981. The applicant's site plan map submittal identifies or denotes the location of the "2-STORY DWELLING/LANAI" encroachments constructed beyond the minimum "building line" outside the building envelope which are graphically identified by a series of "evenly spaced" dashed lines on the variance site plan map. The bulk of the dwelling's living area, detached garage, and detached water tank building improvements located on Lot 30 are constructed within the building envelope prescribed by the Zoning Code and meet minimum yard(s) and open space requirements.

It appears that the building encroachment problems were discovered during a recent sale of the subject property. The applicant, on behalf of the current owner(s), submitted a recent survey map dated May 14, 2001 that identifies the location of the 2-story dwelling, garage, water tank, and other site improvements. This site plan denotes distances between portions of the dwelling lanai from the affected side boundary line. Portions of the 2-story dwelling/lanai and attendant roof eaves were constructed into minimum 20 feet side yard and respective 14 feet side yard open spaces required by the Zoning Code. It appears the previous owner(s) and builders were unaware of the building setback problems and encroachment issues. No evidence has been found to show indifference or premeditation by the previous owner(s) or builder to deliberately create or intentionally allow the building encroachment problems to occur.

It appears that the existing dwelling improvements were constructed under valid building permits issued to the owners between 1981 and 1988. It appears that building inspections of the premises during building construction throughout the life of the building permits did not disclose any building encroachments or building setback irregularities.

Therefore, considering the applicant's submittals, findings, and existing circumstances at this time, it is felt there are special or unusual circumstances applying to the subject property which exist either to a degree which deprives the applicant or current owners 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.

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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 existing building encroachments and truncate portions of the dwelling/lanai and attendant roof eaves that encroach into the respective side yard and side yard open space requirements of the Zoning Code.
2. Redesign and relocate the existing dwelling/lanai/roof eave improvements to fit within the building envelope prescribed by the Zoning Code and other design and remedial building alternatives.
3. Consolidate the subject property (Lot 30) with the adjoining lot (Lot 31) and resubdivide the property back into like areas and shift or adjust affected yards accordingly to provide minimum building lines, minimum yards, and other associated open space requirements.

To require or impose removal of the dwelling/lanai and modifying the attendant roof eave(s) to meet the Zoning Code's minimum yards and open yard requirements would seem unreasonably harsh and uneconomical at this time. The removal of the building encroachments or relocation of these existing improvements may disrupt the 2-story dwelling's structural integrity, change internal room lighting and air circulation, and change the building's overall building geometry and exterior character. It appears that the applicant, that the consolidation and subdivision option, pursuant to Chapter 23, Subdivisions, Section 23-7, was not considered.

No evidence has been found to show indifference or premeditation by the applicant or owners/builders to deliberately build or intentionally allow the building encroachment problems to be created nearly 23 years ago. The applicant submitted the variance application to address and resolve these 23 year old building encroachments within one of Lot 30's side yard and respective side yard open space.

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 or current owners when a more reasonable alternative is available by the granting of the subject variance request.

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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. The existing dwelling/lanai, garage, and water tank building improvements were constructed under a series of building permits issued by the County between 1981 and 1988. It appears that the building inspections of the premises, during building construction, and throughout the life of the building permits did not disclose any encroachments into the affected yards or any other building irregularities. The building permits issued by the DPW-Building Division to construct the building improvements on the subject TMK property were closed by the DPW-Building Division together with other associated electrical and mechanical permits issued. The applicant, on behalf of the current owners are trying to resolve building dwelling and lanai encroachment issues were disclosed after a modern survey of Lot 30 or subject TMK property to confirm boundary corners and locate existing building improvements was performed and a map of Lot 30 or the TMK property showing and identifying the existing building improvements, "AS BUILT" was prepared for escrow purposes.

The circumstances to allow and permit the existing dwelling encroachments to be built within that affected side yard and attendant side yard open space requirements approximately 23 years ago are unique.

It appears that the commencement of building activity and the dwelling encroachments built into or within that affected yard(s) in 1981 were not perceptible and not physically and visually obtrusive from adjacent TMK property(s) or the rights-of-way. It appears the 23 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 side yards was a contractor or builder's mistake which occurred in 1981 or a 1979 misinterpretation of the minimum building yards or boundary line(s) by the previous owners or builders. Inspection of the TMK property during the life of the building, electrical, and mechanical permits issued between 1981 and 1988 did not discover any dwelling encroachment problems or reveal and disclose any irregular building problems. Therefore, it is felt that the existing 2-story dwelling/lanai encroachments within one of Lot 30's side yards and attendant side yard open spaces required by the Zoning Code will not detract from the character of the immediate neighborhood or other surrounding property within the subdivision.

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The subject variance application was acknowledged by letter dated December 4, 2001. The applicant's agent agreed to extend the variance decision date to no later than May 3, 2002. 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 and lanai encroach into a side yard and attendant side yard open space required by Chapter 25, the Zoning Code and are identified on a site plan map dated May 14, 2001 submitted with the variance application. The approval of this variance allows portions of the dwelling and lanai encroachments, AS BUILT" within a side yard and attendant side yard open space to remain on Lot 30 or subject TMK property.
4. No permit shall be granted to allow an ohana dwelling or building permit issued to allow construction of an "ohana" dwelling shall be granted to the subject TMK property, subject to provisions of the Zoning Code or State Law which may change from time to time.
5. Future building additions or improvements and permitted uses on Lot 30 or the subject TMK property shall be subject to State law and County ordinances and regulations pertaining to building construction and building occupancy.

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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 Office - Hilo
Planning Dept. - Kona