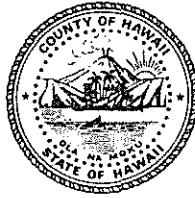


Harry Kim
Mayor



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

February 7, 2002

James C. Clay, Esq.
LAW OFFICES OF
JAMES C. CLAY
75-5870 Walua Road, Suite 201
Kailua-Kona, HI 96740

Dear Mr. Clay:

VARIANCE PERMIT NO. 1255 WH (VAR 01-080)
Applicant: JAMES C. CLAY
Owner: MARLENE E. CALVERT
**Request: Variance from Minimum Yards
and Open Space Requirements,
Pursuant to Chapter 25, the Zoning Code**
Tax Map Key: 7-3-023:003, Lot 71

After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No. 1255 allows portions of a dwelling ("1-Story House") to remain on the subject TMK property, "AS BUILT", with a minimum 12.3 to 14.5 feet side yard and minimum 9.5 feet side yard open space requirements according to the variance application's site plan dated June 4, 2001. The variance is from Lot 71's minimum yards and open space requirements required by the Zoning Code, Chapter 25, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), Section 25-5-77, Other regulations, and Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open spaces.

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BACKGROUND AND FINDINGS

1. **Location.** The subject property, containing 22,034 square feet, is Lot 71 of Kona Coastview Subdivision, Unit IV, File Plan 975, being a portion of Grant 1606 to Kanelihua and situated at Kalaoa 3rd, North Kona, Hawaii.

The property is zoned Agricultural (A-5a) by the County and designated Urban "U" by the Land Use Commission (LUC). The property's land area is below the minimum 5 acre lot size area required for the A-5a zone designation and is therefore deemed "non-conforming".

2. **Variance Application.** The applicant submitted a variance application on November 8, 2001.
3. **Variance Application-Site Plan.** The applicant's site plan drawing, drawn to scale and June 4, 2001, was certified by Wes Thomas Associates and identifies the location of existing dwelling and other site improvements.
4. **Building Permit Records.** A copy of the approved original detailed building construction plans to construct the existing dwelling(s) and other site improvements on the property were not submitted with the variance application.

Note: Any free-standing perimeter stonewalls, retaining walls, or other perimeter wall features, which are less than six (6) feet in height, respectively; and, located on and within the subject property or along common boundary do may not require any building permit(s). Any existing perimeter walls or fences straddling TMK boundary lines or any boundary encroachments must be addressed and resolved by applicant or between the affected parties or between legal property owner(s).

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5. **Agency Comments and Requirements:**

- a. The variance application included a "REAL PROPERTY TAX CLEARANCE" dated September 24, 2001 stating:

"This is to certify that Calvert, Marlene (owner of record) has paid all Real Property Taxes due the County of Hawaii up to and including 12/31/2001."

- b. The State Department of Health (DOH) memorandum dated December 13, 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 to be maintained."

- c. The Department of Public Works (DPW) memorandum dated December 12, 2001, states in part:

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

Any encroachments within the County right-of-way should be removed.

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

6. **Notice to Surrounding Property Owners.** Proof of mailing a first and second notice to the surrounding property owners was received by the Planning Department (Kona) on or about February 7, 2002. For the record, it appears that the first and second notice was mailed on December 21, 2001 and December 24, 2001, respectively, by the applicant.

7. **Comments from Surrounding Property Owners or Public.** No written comments or objections to the variance application were received from the surrounding property owners or public.

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SPECIAL AND UNUSUAL CIRCUMSTANCES

It appears that the building encroachment problems were discovered during the sale of the subject property. The applicant submitted a recent survey map/site plan dated June 4, 2001 denoting the location of the existing dwelling and other site improvements, "AS BUILT". This site plan map identifies the distance between portions of the dwelling and attendant roof eaves from the affected boundary line(s). Portions of the existing dwelling was constructed into minimum side yards and respective open space requirements. It appears that the current or previous owner(s) were unaware of the encroachment issues.

Therefore, considering the foregoing facts and circumstances, it is felt there are special or unusual circumstances applying to the subject property which exist either to a degree which deprive the current owner/applicant 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 current owner(s). Alternatives available to the applicant to address and correct the existing building encroachments include the following actions:

1. Remove the building encroachments within the affected side yard.
2. Redesign and relocate the dwelling to fit within the correct building envelope prescribed by the Zoning Code, and/or other similar design alternatives, etc.
3. Consolidate Lot 71 with the adjoining property (Lot 70) and resubdivide the resultant consolidated 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.

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To require a partial or impose removal of the building encroachments and/or design modifications of the existing dwelling improvements would seem unreasonably harsh and uneconomical at this time. The removal and/or redesign of the existing dwelling encroachments may disrupt the dwelling's structural integrity and disrupt the existing building orientation and relationship to or character of the surrounding neighborhood.

The option to acquire additional property or consolidate Lot 71 with adjoining property and subdivide the resultant property pursuant to Chapter 23, Subdivisions, was not addressed or considered by the applicant or current owner(s).

The applicant, on behalf of the current owner, is trying to address and resolve building encroachment that were built and established within the affected side yard of the subject property. No evidence has been found to show indifference or premeditation by the current or previous owner(s) to deliberately create or intentionally allow the building encroachment problems or issues to occur.

The Planning Department acknowledges there may be other design or building alternatives available to the applicant and owner(s) beyond those alternatives 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 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 permitted structure(s) and boundary/property lines. It appears that the existing dwelling was constructed under valid building permit(s) issued to the previous owner(s). It appears that the building inspections of the premises, during building construction and throughout the life of the building permit(s) to construct the existing dwelling improvements did not disclose any building encroachments or setback irregularities. The applicant and current owner(s) became aware of the encroachment problems during escrow to sell/purchase the property. The applicant and current owner are trying to resolve building encroachment problems and other encroachment issues that were disclosed after a modern survey map was presented for escrow purposes.

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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 property's side yards and respective side yard open space requirements on a non-conforming sized property (Lot 71).

It appears that existing dwelling encroachments into the affected side yard(s) and respective open spaces are not physically and visually obtrusive from adjacent property(s) or the nearest public right-of-way. 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 building (dwelling) encroachment(s) within the affected side yard and open spaces were building mistake(s) or misinterpretation of the minimum building yards or boundary line(s) by the current owner or builder. It appears that building inspections of the property during the life of the building permit(s) issued to allow the dwelling by the County-DPW or other agencies did not discover any building encroachment problem(s) or reveal and disclose any irregular building setback problems or encroachment issues. Therefore, it is felt that the existing dwelling encroachments within said affected side yard and open spaces will not detract from the character of the immediate neighborhood or the subdivision.

The subject variance application was acknowledged by letter dated December 4, 2001. Additional time to allow the Planning Director to understand and address agency comments was required. The applicant, on behalf of the current owner, agreed to extend the variance decision date to no later than February 8, 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.

PLANNING DIRECTOR'S DECISION AND VARIANCE CONDITIONS

This variance request is approved subject to the following conditions:

1. The applicant/owner, 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 roof eaves will not meet minimum side yard and attendant minimum side yard open space requirements required by Chapter 25, the Zoning Code. The approval of this variance allows the existing dwelling and other permitted site improvements located on the property and denoted on the variance application's site plan, dated June 4, 2001, to remain, "AS BUILT".

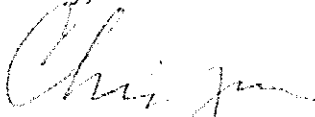
The applicant or owner(s) shall contact the Department of Public Works (DPW-Kona Office) and remove the existing stonewall or CRM wall encroachments within Ahikawa Street (Right-of-Way) identified on the site plan dated June 4, 2001. Portions of the stonewall(s) or CRM walls within the public right-of-way (Ahikawa Street) shall be removed, relocated, or meet DPW requirements. The applicant or owners shall address these specific wall encroachment issues prior to change in ownership or change to property title.

4. No permit to allow an ohana dwelling or building permit issued to construct a second dwelling unit or "ohana dwelling" shall be granted to the subject property, subject to provision of the Zoning Code or State Law, which may change from time to time.
5. Future building improvements and permitted uses 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
P:\WP60\WRY\FORMLETT\VARAPPZCTMK73023003.JCC

xc: Real Property Tax Office - Kona
Planning Dept. File - Kona