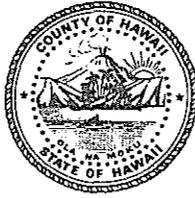


Harry Kim
Mayor



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

April 22, 2002

Mr. Bret Marsh
dba BRET MARSH
DRAFTING SERVICE
P. O. Box 10939
Hilo, HI 96720

Dear Mr. Marsh:

VARIANCE PERMIT NO. 1277 (VAR 02-010)

Applicant: BRET MARSH

Owner: JEFF COX

**Request: Variance from Minimum Yards and
Open Space Requirements, Pursuant
to Chapter 25, the Zoning Code**

Tax Map Key: 1-5-091:071, Lot 1267

After reviewing your variance application and information submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No. 1277 allows portions of the existing dwelling within a 10 foot side yard to remain, "AS BUILT", according to the applicant's site plan dated December 19, 2001. The variance will allow portions of the dwelling to remain with a minimum 7.55 to 8.36 foot side yards and attendant minimum 3.96 feet to 4.76 foot side yard open space, in lieu of the minimum 10 foot side yard and attendant 5 foot side yard open space requirements. The variance is from Lot 1267's minimum yards, pursuant to 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, (a).

BACKGROUND AND FINDINGS

1. **Location and Zoning.** The subject property, Lot 1267 consisting of 12,253 square feet, is located within the Hawaiian Shores Subdivision and Portion of L.C. Award 11216:40, Pt. 1, File Plan 737, and is situated at Waiakahiula, Puna, Hawaii.

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The non-conforming sized property is zoned Agricultural (A-1a) and designated Urban "U" by the State Land Use Commission (SLUC).

2. **Application.** The applicant (Bret Marsh), submitted the variance request and application, supplemental information, site plan, tax clearance, and \$250.00 filing fee check on March 1, 2002.
3. **Site Plan.** The variance application's map or site plan drawing, drawn to scale and dated December 19, 2001, was surveyed and prepared by The Independent Hawaii Surveyors. The site plan denotes and identifies the dwelling and roof eave encroachments constructed within one of the property's two 10 feet wide side yards. The site plan denotes and identifies the building line (setback line) using a series of "broken" or "dashed" line(s) prescribed by the Hawaii County Zoning Code. Portions of the dwelling and roof eaves have been constructed beyond the building line into one of the side yards and do not meet the minimum 10 feet side yard and corresponding 5 feet side yard open space requirements of the County Zoning Code.

Note: The site plan drawing does not denote the access location via S. Puni Makai Street, existing on-site driveway, and location of existing cesspool or septic system.

4. **Building Permit(s).** Copy(s) of building permit(s) and detailed building construction plans of the dwelling between 1992 and 2000 were not submitted with the applicant's variance application. However, county building records show that Department of Public Works (DPW)-Building Permits No.(s): 902914, 921604, and 000378, issued to "Jeff Cox" or the TMK property were closed by the DPW.
5. **Agency Comments and Requirements (VAR 02-010).**
 - a. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated February 28, 2002 states in part the following:

"TMK(3) 1-5-091-071-0000"

"This is to certify that COX, JEFF A (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 JUNE 30, 2002."

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- b. The County of Hawaii Fire Department (HFD) memorandum dated March 15, 2002 in the subject variance file states:

“We have no comments regarding the above-referenced Variance Application.”

- c. State Department of Health (DOH) memorandum dated March 22, 2002, in the subject variance states:

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

- d. The Department of Public Works (DPW) memorandum dated April 12, 2002, states:

“We have reviewed the subject application forwarded by your memo dated March 12, 2002 and have the following comment.

Approval of the application shall be conditioned on: The minimum setbacks shall be maintained as follows: residential structures-3 ft. side and 3 ft. rear; commercial structures-5 ft. side and 5 ft. rear.”

6. **Notice to Surrounding Owners.** Proof of mailing notice(s) to surrounding property owners were received by the Planning Department. It appears that first and second notice(s) were mailed on March 15, 2002 and March 27, 2002, respectively, by the applicant.

No further agency comments or other objections to the applicant’s variance request from the surrounding property owners or public were received by the Planning Department.

SPECIAL AND UNUSUAL CIRCUMSTANCES

In consideration of the applicant’s submittals and findings above, it appears that portions of the dwelling, constructed under a series of building permits between 1990 and 2000, encroach into the subject TMK property’s side yard. It appears that small portions or 2-corners of the 12 year old dwelling and attendant roof eaves encroach into one of the TMK property’s 2-side yards.

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The bulk of the dwelling or living areas within the dwelling are within the property's building envelope or within building setback line(s) limits.

The applicant submitted a recent survey map/site plan and written report by a surveyor that identifies the location of the dwelling and roof eave encroachments within that 10 feet wide side yard. The site plan denotes and identifies distances between portions of the dwelling's (corners) wall and corresponding roof eave(s) from that side yard boundary line. It appears that portions of the dwelling and attendant roof eaves were constructed approximately 1.7 feet and 2.5 feet, and corresponding roof eaves were constructed beyond the building line limit into one of the property's 10 feet wide side yards. It appears that the applicant and owner became aware of the severity of the encroachments or setback issues during escrow to sell the property.

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 applicant and 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.

ALTERNATIVES

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

1. Remove the dwelling "corners" and roof eave encroachments within the affected side yard.
2. Redesign and relocate the existing dwelling and attendant roof eaves to fit within the building envelope prescribed by the Zoning Code and other design and remedial building alternatives.
3. Consolidate the subject TMK property (Lot 1267) with the adjacent TMK property (Lot 1269) and resubdivide the consolidated bulk lot back into 2 lots changing the common boundary between the lots to accommodate existing buildings/uses on these revised lots meeting minimum building yards prescribed by the Zoning Code.

To require or impose partial removal or relocation of the dwelling corners and roof eaves would seem unreasonably harsh and uneconomical at this time. The partial removal of the dwelling and

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roof eave encroachments or relocation of the building improvements may disrupt the dwelling's structural integrity, change internal room lighting and air circulation within the dwelling, and change the building's overall building geometry and exterior building character. The consolidation/resubdivision alternative with adjoining Lot 1269 was not considered.

No evidence has been found to show indifference or premeditation by the applicant or current owner in 1990, 1992, and 2000 to deliberately ignore or intentionally allow the building encroachment problems to occur. The applicant submitted the variance application to address and resolve the dwelling and roof eave encroachment problem within the affected side yard.

The Planning Department acknowledges there may be other design or building alternatives available to the applicant and current 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 applicant's 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 series of 3-building permits issued between 1990, 1992 and 2000 to the owner (Jeff Cox). It appears that all building permit(s) issued by the DPW-Building Division to construct the dwelling were closed by the DPW-Building Division. The applicant and current owner are addressing and trying to resolve the small building encroachment issues that were disclosed after a modern survey of the existing dwelling improvements and the property boundaries was prepared for escrow and pending property sale.

The circumstances to allow and permit the 12-year old dwelling and roof eave encroachments constructed within the affected side yard between 1990 and 2000 are unique.

It appears that the commencement of building activity and the dwelling encroachments built into or within that affected side yard in 1990 were not perceptible and not physically or visually noticeable from the adjoining lot (Lot 1269), other nearby or surrounding TMK property(s), and the right-of-way. It appears these 12 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 building encroachment(s) within the affected side yard was a building mistake in 1990 or a misinterpretation of the minimum building line or boundary line(s) by the owners or owner's contractor/builder during construction. The dwelling encroachment issues

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were discovered after a modern survey and pending sale of the property revealed the corner and roof eave encroachments within a side yard. The applicant and owner are honestly trying to address cumulative building errors and address the dwelling's current position. Therefore, in view of the findings and existing circumstances, it is felt that these small dwelling and roof eave encroachments within the side yard will not detract from the character of the immediate neighborhood or other surrounding property within the subdivision.

The subject variance application was acknowledged by Planning Department's letter dated March 12, 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:

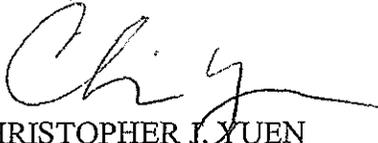
1. The applicant/owner(s), their assigns or successors shall be responsible for complying with all stated conditions of approval.
2. The applicant/owner(s), successors or assigns shall indemnify and hold the County of Hawaii harmless from and against any loss, liability, claim, or demand for the property 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 corresponding roof eaves will not meet Chapter 25, the Zoning Code's minimum 10 feet side yard and corresponding 5 feet side yard open space requirements. The approval of this variance allows the dwelling and roof eaves to remain, "AS BUILT", according to the variance application's site plan dated December 19, 2001.
4. No permit to allow an ohana dwelling or building permit issued to construct an "ohana" dwelling shall be granted to the subject TMK property, subject to provision of the Zoning Code or State Law, which may change from time to time.

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5. Future building improvements and permitted uses on Lot 1267 or 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 I. YUEN
Planning Director

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xc: Real Property Tax - Hilo
Planning Dept. - Kona