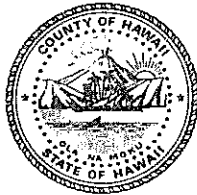


Harry Kim
Mayor



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

July 2, 2002

Robert D. Triantos, Esq.
CARLSMITH BALL LLP
P. O. Box 1720
Kailua-Kona, HI 96745-1720

Dear Mr. Triantos:

VARIANCE PERMIT NO. 1293 WH (VAR 02-013)

Applicant: ROBERT D. TRIANTOS, ESQ.
Agent: CARLSMITH BALL LLP
Owner: BARBARA M. KENNEDY
Request: Variance from Minimum Yards
Pursuant to Chapter 25, the Zoning Code
Tax Map Key: 7-7-022:011, Lot 11

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. 1293 allows portions of the dwelling (2-Story House) and swimming pool located with respective yards to remain on the property, "AS BUILT", according to applicant's site plan dated January 31, 2002 (Revised: February 11, 2002). The variance request is from Lot 11's minimum yard requirements, pursuant to the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 1, Section 25-5-7, Minimum yards, (a) (2) (A) (B).

BACKGROUND AND FINDINGS

1. **Location.** The subject TMK property, Lot 11 containing 10,062 square feet, is within the Keauhou Uka Subdivision, Unit II, portion of Grant 3019 to Kaaipulu, and situated at Kapalaalaea 2nd, North Kona, Hawaii.
2. The subject TMK property is zoned Single-Family Residential (RS-10) and designated Urban "U" by the State Land Use Commission.

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3. **Application.** The applicant or agent submitted the variance application form, supplemental information, tax clearance, and \$250.00 filing fee check on March 14, 2002.

4. **Site Plan.** The variance site plan map, drawn to scale and dated January 31, 2002 (Revised: February 11, 2002), was surveyed and prepared by Chrystal T. Yamasaki, LPLS of Wes Thomas Associates. The site plan identifies the building envelope within Lot 11 prescribed by applying the minimum yards pursuant to Hawaii County Zoning Code. The site plan map denotes and identifies the dwelling and swimming pool encroachments within the affected yards.

Note: The site plan does not identify the location of existing cesspool(s) or other wastewater system.

5. **Building Permit(s).** County records indicate that building permits to construct the dwelling and swimming pool located on the subject TMK property were issued by the DPW-Building Division.

6. **Agency Comments and Requirements WH (VAR 02-013).**

- a. The Department of Public Works (DPW) memorandum dated March 29, 2002, states:

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

Please refer to the attached Building Division comments dated March 19, 2002.

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

The attached DPW memorandum dated March 19, 2002 states in part the following:

“Approval of the application shall be conditioned on the comments as noted below.

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The Building # 975851 permit for the subject dwelling was never finalized.

Others: Approval will be given when Building Permit #975851 is finalized."

- b. State Department of Health (DOH) memorandum dated April 1, 2002 states:

"We have no objections to the proposed variance application. However, minimum setback requirements for existing wastewater systems needs to be maintained."

7. **Notice to Surrounding Property Owners.** Affidavits of mailing a first and second notice(s) submitted by the applicant indicate that the first and second notice(s) were mailed on or about March 13, 2002 and March 25, 2002, respectively.
8. **Comments from Surrounding Property Owners or Public.** No further comments were received from the agencies. No objections to the variance application were received from the surrounding property owners and public.

SPECIAL AND UNUSUAL CIRCUMSTANCES

In consideration of the applicant's submittals and findings above, it appears that small portions of the "2-Story House" or dwelling and swimming pool were recently constructed within minimum yard(s) of Lot 11 pursuant to Chapter 25, the Zoning Code. Small portions of the dwelling and the swimming pool were inadvertently constructed beyond the "building line" outside the building envelope defined by the minimum yards of the Zoning Code. The bulk of the existing dwelling's living area and swimming pool are within the building envelope prescribed by the Zoning Code and meet minimum yard(s) and open space requirements.

It appears that these small building encroachments were discovered after a recent survey map was prepared for the applicant or owner(s) for the owner or escrow purposes. The recent survey map or variance site plan map identifies and denotes the distance between portions of the dwelling and swimming pool from Lot 11's boundary lines. It appears that the current owner or builders were not aware of these small building encroachments. No evidence has been found to show indifference or premeditation by the owner or builders to deliberately create or intentionally allow the building encroachment issues to occur.

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It appears that the dwelling and other site improvements were constructed under a series of building permit(s) and associated construction permits issued by the DPW. It appears that the building inspections of the premises, during building construction and throughout the life of the building permit did not disclose any building encroachments or setback irregularities.

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 applicants 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 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 portions of the dwelling encroachments and modify attendant roof eaves that encroach into the respective yard(s) required by the Zoning Code.
2. Redesign and relocate the existing building 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 11 with the adjacent lot(s) and resubdivide the property back into like areas and shift or adjust affected boundary lines and yards accordingly to comport with the minimum yard requirements of the Zoning Code.

To require or impose removal of the dwelling and swimming pool encroachments and modifying the attendant roof eave(s) to meet minimum 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 dwelling's structural integrity, change internal room lighting and air circulation, and change the building's overall building geometry and exterior character. Pursuant to the applicant, the consolidation and subdivision option, pursuant to Chapter 23, Subdivisions, Section 23-7, is not available.

Furthermore, all building encroachments are below allowable tolerances for the subject property pursuant to recent changes to the County Code and Ordinance No. 02 70, "De Minimis Structure Position Discrepancy".

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No evidence has been found to show indifference or premeditation by the applicant or owner(s) to deliberately build or intentionally allow the building encroachment problems to be created. The applicant submitted the variance application to address and resolve the encroachment problem and issues within the affected yard(s) prescribed by the Zoning Code.

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.

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 and swimming pool improvements were constructed under a series of building permits issued by the County. 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 applicant and current owner(s) are trying to address and resolve building encroachment problems or issues that were disclosed after a modern survey of the existing TMK property/premises was performed and the variance application site plan map (EXHIBIT B) of the TMK property identifying the dwelling and swimming pool locations, "AS BUILT", was prepared for the variance application or escrow.

The circumstances to allow and permit the existing dwelling and swimming pool encroachments to be built within that affected yard(s) are unique.

It appears that the commencement of building activity and the building encroachments built into or within that affected yards were not perceptible and not physically and visually obtrusive from the rights-of-way or adjoining property(s). It appears these small and recent 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 yards was a contractor or builder's mistake. Inspection of the TMK property during the life of the building, electrical, and mechanical permits did not discover any dwelling encroachment problems or reveal and disclose any irregular building position problems. Therefore, it is felt that the existing dwelling encroachments within Lot 11's respective yard(s) required by the Zoning Code will not detract from the character of the immediate neighborhood or other nearby property(s) within the subdivision.

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The subject variance application was acknowledged by letter dated March 20, 2002. The applicant's agent agreed to extend the date to July 1, 2002, whereupon, on or before said decision date, the Planning Director shall render a decision on the subject variance.

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 a "2-Story House" encroach into the respective yards required by Chapter 25, the Zoning Code and are identified on a site plan submitted with the variance application. The approval of this variance allows portions of the dwelling (2-Story House) and swimming pool building encroachments identified and denoted on the applicant's site plan map dated January 31, 2002 (Revised: February 11, 2002), to remain, "AS BUILT", on Lot 11 or the subject TMK property.
4. The outstanding Building Permit-#975851 shall be "finaled" or closed by the Department of Public Works (DPW)-Building Division prior to any further change in title or sale of the property.
5. Future building improvements and permitted uses on Lot 11 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
P:\WP60\WRY\FORMLETT\VARAPPZCTMK77022011.RDTESQ

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