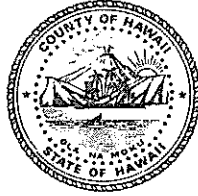


Harry Kim
Mayor



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

Steven S. C. Lim, Esq.
CARLSMITH BALL LLP
P. O. Box 1720
Kailua-Kona, HI 96745-1720

Dear Mr. Lim:

VARIANCE PERMIT NO. 1292 (VAR 02-018)

Applicant: STEVEN S. C. LIM, ESQ.
Agent: CARLSMITH BALL LLP
Owner: WILFRED KEALOHA SUGIYAMA
Request: Variance from Minimum Yards
Pursuant to Chapter 25, the Zoning Code
Tax Map Key: 1-8-082:077, Lot 92

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. 1292 allows portions of the dwelling to remain, "AS BUILT", according to applicant's site plan dated December 26, 2001, with a minimum 5.7 feet to 7.2 feet side yard and attendant minimum 2.5 feet to 4.4 feet side yard open space requirements. The variance request is from Lot 92's minimum yard requirements, pursuant to the Hawaii County Code, Chapter 25, Zoning, 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, respectively.

BACKGROUND AND FINDINGS

1. **Location.** The subject TMK property, Lot 92 containing 8346 square feet, is located within Pacific Paradise Mountain Manor, Increment 3, File Plan 1201, and situated at Olaa, Puna, Hawaii.
2. The subject TMK property is zoned Agricultural (A-5a) and designated Agriculture "A" by the State Land Use Commission.

020956

JUL 03 2002

Steven S. C. Lim, Esq.
CARLSMITH BALL LLP
Page 2
July 2, 2002

3. **Application.** The applicant or agent submitted the variance application form, supplemental information, tax clearance, and \$250.00 filing fee check on April 1, 2002.
4. **Site Plan.** The variance site plan map, drawn to scale and dated December 26, 2002 was surveyed and prepared by Paul H. Murray, LPLS. The site plan identifies the building envelope prescribed within Lot 92 by applying the minimum yards pursuant to Hawaii County Zoning Code. The site plan map denotes and identifies the dwelling 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 located on the subject TMK property were issued by the DPW-Building Division.
6. **Agency Comments and Requirements WH (VAR 02-018).**

- a. The Department of Health (DOH) memorandum dated April 17, 2002, states:

“The Department of Health is reserving comments for the proposed project at this time. The applicant would need to indicate where existing sewer lines and/or individual wastewater systems are located on the site plan.”

- b. The Department of Public Works (DPW) memorandum dated May 2, 2002 states:

“We have reviewed the subject variance application forwarded by your memo dated April 9, 2002 and have the following comments.

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.

Roof projections shall not extend more than 12 inches into areas where openings are prohibited. Openings are not permitted less than 3’-0”.

Steven S. C. Lim, Esq.
CARLSMITH BALL LLP
Page 3
July 2, 2002

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 28, 2002 and April 17, 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 "Dwelling" was constructed within a side yard of Lot 92. A small portion or sliver of the dwelling's living area was inadvertently constructed beyond the "building line" outside the building envelope defined by the minimum yards of the Zoning Code. The remaining bulk of the dwelling and living areas are within the building envelope prescribed by the Zoning Code.

It appears that this small building encroachment was discovered after a recent survey map was prepared for the owner or escrow purposes. The recent survey map or variance site plan map identifies and denotes the distance between dwelling wall and affected side boundary line. It appears that the current owner or builders were not aware of the building encroachment issues. 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.

It appears that the dwelling and other site improvements were constructed under a valid building permit 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.

Steven S. C. Lim, Esq.
CARLSMITH BALL LLP
Page 4
July 2, 2002

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 92 with the adjacent lot (Lot 91) and resubdivide the property back into like areas and shift or adjust affected side yards accordingly to meet minimum building lines and minimum yard and open space requirements.

To require or impose removal of the dwelling 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.

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.

Steven S. C. Lim, Esq.
CARLSMITH BALL LLP
Page 5
July 2, 2002

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 improvements were constructed under a recent building permit 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 of the TMK property identifying the dwelling and roof eave, "AS BUILT", was prepared for the variance application or escrow.

The circumstances to allow and permit the existing dwelling encroachments to be built within that affected side yard and attendant side yard open space 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 92'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.

The subject variance application was acknowledged by letter dated April 9, 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.

Steven S. C. Lim, Esq.
CARLSMITH BALL LLP
Page 6
July 2, 2002

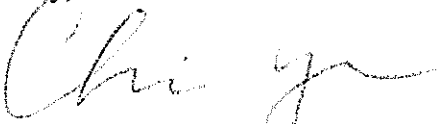
VARIANCE DECISION AND CONDITIONS

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 "DWELLING" and attendant roof "EAVES" encroach into a side yard 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 the dwelling encroachments identified and denoted on the applicant's site plan map dated December 26, 2001, to remain, "AS BUILT", on Lot 92 or the subject TMK property.
4. Future building improvements and permitted uses on Lot 92 or 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
P:\WP60\WRY\FORMLETT\VARAPPZCTMK18082077.RDTSSCLESQ

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