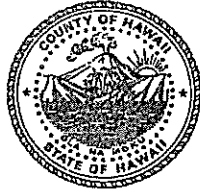


VAR 1389



Harry Kim
Mayor

Christopher J. Yuen
Director

Roy R. Takemoto
Deputy Director

County of Hawaii

PLANNING DEPARTMENT

101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720-3043
(808) 961-8288 • Fax (808) 961-8742

September 24, 2003

Michael Moore, Esq.
TSUKAZAKI YEH & MOORE
ATTORNEYS AT LAW
85 W. Lanikaula Street
Hilo, HI 96720

Dear Mr. Moore:

VARIANCE PERMIT NO. 1389 (VAR 03-023)

Applicants: MICHAEL MOORE, ESQ./TERESA L. FUNES

Owners: TERESA L. FUNES, ET AL.

**Request: Variance from Minimum Yards,
Chapter 25, the Zoning Code**

Tax Map Key: 1-5-100:004, Lot 84

After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No. 1389 allows portions of the dwelling (GARAGE) improvements with a minimum 9.44 feet to 9.99 feet side yard, "AS BUILT", to remain on the property according the variance site plan map dated February 28, 2003. The variance request is from the subject property's minimum 10 feet side yard, pursuant to the Hawaii County Zoning Code, Chapter 25, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), and Section 25-5-77, Other regulations.

BACKGROUND AND FINDINGS

1. **Location.** The subject property, Lot 84 containing 19,104 square feet, is located within Hawaiian Shores Subdivision and situated at Waiakahiula, Puna, Hawaii.

The property is zoned Agricultural (A-1a) by the County and designated Urban "U" by the Land Use Commission (LUC).

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2. **Variance Application-Site Plan**. The applicant submitted the variance application, attachments, and filing fee to the Planning Department on or about March 19, 2003. The applicant's variance application site plan or survey map drawing is drawn to scale and dated February 28, 2003. The survey map by The Independent Hawaii Surveyors shows the dwelling and garage position and roof eave locations, "AS BUILT", on "LOT 84".

Note: The variance request does not address the location of cesspool or other individual wastewater system (IWS) on Lot 84.

3. **Agency Comments and Requirements-(VAR 03-023):**

- a. The Department of Public Works (DPW) memorandum dated June 10, 2003 states in part:

"We have reviewed the subject application forwarded by your memo dated May 13, 2003 and offer the following comments.

Approval of the application shall be conditioned as noted below.

The two electrical permits E881826 and EH66095 for the subject dwelling have no status of inspection.

Approval will be given when all outstanding electrical permits are closed with an ending date for inspection."

Note: The applicant requested time to address the status of the outstanding electrical permits. According to County permit records, it appears that E881826 and EH66095 were closed by the DPW-Building Division on August 26, 2003 and September 11, 2003, respectively.

- b. Pursuant to a September 17, 2003 telephone discussion with State Department of Health (DOH) in Hilo:

"We have no comments on the variance application."

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3. **Notice to Surrounding Property Owners.** Proof of mailing a first and second notice was submitted to the Planning Department. For the record, it appears that the first notice and second notice was served on or about May 21, 2003 and May 30, 2003, respectively, by the applicant.
4. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received and following objection letter was received:

Letter dated May 25, 2003 signed by Gwendolyn M.S. Yee, Trustee for Lot 75 or TMK 1-5-100:113 was received on May 29, 2003.

SPECIAL AND UNUSUAL CIRCUMSTANCES

It appears that the building encroachment problems were discovered during escrow or sale of the subject property-Lot 84. The applicant, on behalf of the owners, is trying to resolve building encroachment issues and states, the site plan map was prepared by a surveyor and shows the dwelling position, "AS BUILT", on Lot 84. This site plan shows that a small area or portion of the dwelling's garage was constructed beyond the lot's building lines or building envelope into one of Lot 84's side yards, pursuant to the Hawaii County Zoning Code. County building records indicate the "GARAGE" building improvements were constructed nearly 20 years ago by previous owner(s) or builders. The applicant, on behalf of the current owners became aware of the encroachment issues after the recent survey map was prepared and presented during escrow.

No evidence has been found to show indifference or premeditation by the previous owners or builders to deliberately create or intentionally allow the building encroachment problems to occur. It appears that the dwelling and attached garage improvements were constructed under valid building permits and other construction permits issued by the County. It appears that building inspections of the premises by the agencies during construction of the dwelling improvements did not disclose any building encroachment issues or building setback irregularities.

ALTERNATIVES

Alternatives available to the applicant to address and correct the existing building encroachments include the following actions:

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1. Removing the existing building (GARAGE) encroachments or redesigning or relocating portions of the dwelling and attached garage to fit within the correct building envelope prescribed by the Zoning Code.
2. Consolidation with portion of the adjoining property (LOT 84) and resubdivision of the resultant consolidated lot to modify property lines and adjustment of minimum yards.

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)/uses and boundary/property lines.

It appears that the small portions of the dwelling's garage or the building encroachments into the affected side yard are not physically noticeable or visually obtrusive from the adjoining property(s) and right-of-way. It appears that these small building encroachments have not affected the adjoining lot (lot 82) and other adjoining property(s)/neighborhood or severely changed or altered the surrounding land patterns. Therefore, it is felt that these building encroachments within the minimum yards identified on the variance application's site plan map will not detract from the character of the immediate neighborhood or the subdivision.

The subject variance application was acknowledged by letter dated May 13, 2003. Additional time to verify and address outstanding construction permits issued to the TMK and/or previous owner(s) was requested by the applicant's attorney. An extension of time to render a decision was extended until September 30, 2003.

Based on the foregoing findings and other circumstances, 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

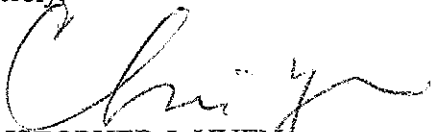
This variance request is approved subject to the following conditions:

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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 original building improvements will not meet Chapter 25, the Zoning Code's minimum side yard requirements. The approval of this variance allows the dwelling or "GARAGE" encroachments identified on the variance application's site plan map dated February 28, 2003, to remain, "AS BUILT", on Lot 84 or the subject TMK property.
4. Future building improvements and permitted uses 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

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xc: Real Property Tax Office
Planning Dept. - Kona