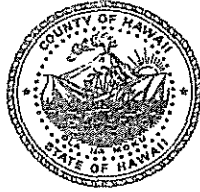


Harry Kim
Mayor



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

June 1, 2004

Curtis Narimatsu, Esq.
166 Kamehameha Avenue
Hilo, HI 96720

Dear Mr. Narimatsu:

VARIANCE PERMIT NO. 1448 (VAR 04-022)
Applicant: CURTIS NARIMATSU, ESQ.
Owner: JOHN WHITTINGHILL
Request: Variance from Minimum Yards
Pursuant to Chapter 25, Zoning
Tax Map Key: 2-6-010:033

After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No. 1448 allows portions of a dwelling ("HOUSE") or dwelling/garage encroachments into minimum yards, "AS-BUILT", to remain on subject TMK property*, according to the variance application site plan map dated January 21, 2004 and other information submitted with the variance application. The variance request is from the subject TMK's minimum front and side yard and attendant open front and side yard requirements pursuant to the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), and Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open space requirements, (a).

Note: The building improvements located within *Kaiwiki Road right-of-way is subject to variance conditions and Department of Public Works (DPW) requirements. The applicant or current owner(s) shall confer with the DPW and address the encroachment issues within the shoulder of the Kaiwiki Road prior to any change in title or sale of the TMK property.

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BACKGROUND AND FINDINGS

1. **Location.** The subject property consisting of 0.5 acre a portion of "Kaiwiki Homestead, Unit 1" and situated at Kaiwiki, South Hilo, Hawaii. The TMK property's address is 2045 Kaiwiki Road.

The non-conforming sized property is zoned Agricultural (A-5a) and designated Agriculture "A" by the Land Use Commission (LUC).

2. **Variance Application-Site Plan.** The applicant submitted the variance application, attachments, and filing fee on or about February 12, 2004. The variance application site plan map drawing is drawn to scale and dated January 21, 2004 by The Independent Hawaii Surveyors. The site plan map denotes the dwelling's position on the property and other building encroachments, "AS-BUILT", into the property's minimum yards and attendant open yard or clear space requirements and County owned right-of-way (Kaiwiki Road).

Note: The variance applicant site plan map does not denote the location of an existing cesspool or independent waste system (IWS). The variance does not address any cesspool or IWS location or the wastewater requirement for the "HOUSE".

The applicant's background states in part:

"I entered into contract to purchase the property in August of 2003 and closed escrow in October of the same year. I purchased the property in "as is" condition. A survey was ordered in August of 2003. I finally received the survey at the end of January 2004. That was the first time that I became aware that there were existing property line encroachments. The sellers did not inform me that there were existing property line encroachments nor was I ever aware that they existed."

Note: The dwelling improvements and other detached buildings were originally constructed in 1936 and 1962. The "Matson" shipping container's position must be addressed by the applicant or current owner(s) pursuant to variance conditions.

County tax records show the garage or "car shed" improvements were constructed prior to the adoption of the original Zoning Code in 1967. As such the "Car Shed" or garage building position or improvements are "non-conforming".

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The portion of the "garage" encroaching into the road right-of-way shall be addressed by the applicant or current owner(s) pursuant to variance conditions.

3. **Agency Comments and Requirements-(VAR 04-022):**

- a. The Department of Public Works (DPW) memorandum dated March 5, 2004, states in part:

"We have reviewed the subject application forwarded by your memo dated February 23, 2004 and oppose the approval of the application for the reasons noted below.

The minimum setbacks shall be maintained as follows: residential structures-3 ft. side and 3 ft. rear; commercial structures-5 ft. rear.

No surveyor report pertaining to setbacks and encroachments was enclosed with the application as stated in note 5 of the January 21, 2004 survey by Niels Christensen.

Remove the existing Matson shipping container from the Kaiwiki Road right-of-way. Remove that portion of the concrete walkway from the Kaiwiki Road right-of-way.

Regarding the encroachment of the garage into the Kaiwiki right-of-way, we recommend an easement be obtained from the Department of Finance. A condition should be placed on the easement that no new construction or substantial improvement will be allowed within the Kaiwiki Road right-of-way.

- b. The State Department of Health (DOH) memorandum dated March 22, 2004 states:

"Wastewater Branch is unable to make comments to the proposed project at this time. Before we can offer any comments, the applicant needs to address the location of all existing wastewater systems."

4. **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

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first and second notices were mailed on February 19, 2004 and March 9, 2004, respectively, by the applicant.

5. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. No written objections from surrounding property owners or public were received:

SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant, on behalf of the current owner, is trying to resolve the building encroachment issues. The variance application's site plan map was prepared by a surveyor and denotes the location of the 67 year old dwelling or "HOUSE" improvements within the TMK property and public right-of-way (Kaiwiki Road), "AS BUILT". The site plan identifies the dwelling's building position together with other building issues within the property's minimum yards and attendant open yard requirements pursuant to the Hawaii County Zoning Code. The applicant or current owner recently became aware of building encroachment issues and no evidence has been found to show indifference or premeditation by contractors, builders, and/or past owner(s) to deliberately create or intentionally to permit or allow the dwelling encroachments to be built. The dwelling improvements were constructed or built pursuant to 1936 and 1962 building permit(s) and other construction permits issued by the County. It appears that past inspections by the agencies did not disclose any building encroachment issues or building setback irregularities on the subject TMK property or within the Kaiwiki Road right-of-way.

The position of the "Matson" shipping container will be removed or relocated pursuant to variance conditions. The position of the "Car Shed" or portion of garage improvements established within Kaiwiki Road will be resolved by the applicant or current owner.

ALTERNATIVES

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

1. Remove the building encroachments or redesigning or relocating the dwelling and garage to fit within the correct building envelope prescribed by the Zoning Code.
2. Consolidation of subject TMK property with adjoining lot(s)/right-of-way and resubdivision to modify property lines and adjust minimum yards.

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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 67 + year old dwelling and garage encroachments into the minimum yards are not physically and visually obtrusive from adjacent property(s) and any building encroachments into the right-of-way are subject to DPW requirements. It appears that these older building encroachments do not depreciate or detract from the character of the surrounding neighborhood, public uses, and surrounding land patterns. Therefore, it is felt that the existing dwelling encroachments within the yards identified on the variance application 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 February 23, 2004. Additional time to consider DPW comments and other building requirements was necessary. The applicant, on behalf of the owner, agreed to extend the decision date to June 15, 2004.

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.

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3. Portions of a dwelling/garage on the subject TMK property will not meet Chapter 25, the Zoning Code's minimum yard and attendant minimum open yard requirements. The approval of this variance allows any dwelling or building encroachments constructed after 1962 to remain, "AS BUILT", on the subject TMK property or variance site plan map dated January 21, 2004.
4. Any open building and/or construction permits for the dwelling improvements on the subject TMK property shall be closed or "finaled" by the DPW-Building Division prior to transfer of title or sale of the property.

The "Matson" shipping container shall be removed from the Kaiwiki Road right-of-way stipulated by the DPW memorandum dated March 5, 2004 or relocate said Matson container within the TMK property. The applicant or current owner shall notify the DPW that the Matson shipping container was removed and address other building issues or site improvements ("concrete walkway") within the Kaiwiki Road right-of-way prior to any further change in property title or sale of subject TMK property.

The applicant or owner(s) shall confer with the DPW and/or other agencies to secure an "encroachment easement" for the portion of the "non-conforming" garage improvements located within the Kaiwiki Road right-of-way or remove only the garage improvements within the Kaiwiki Road right-of-way.

5. No permit to allow an ohana dwelling shall be granted on subject TMK property subject to provisions of the Hawaii County Zoning Code or State Law which may change from time to time.
6. Future building improvements, including the relocation of the Matson container, and other permitted uses shall be subject to State law and County ordinances and regulations pertaining to building construction and building occupancy.

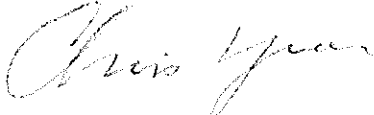
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Should any of the foregoing conditions not be complied with, the Planning Director may proceed to declare this Variance Permit null and void.

Sincerely,



CHRISTOPHER J. YUEN

Planning Director

WRY:pak

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xc: Real Property Tax Office-Hilo
Planning Department-Kona