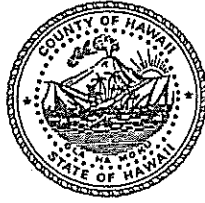


Harry Kim
Mayor



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

July 6, 2004

Ms. Wailana Herbst
519 Manono Street
Hilo, HI 96720

Dear Ms. Herbst:

VARIANCE PERMIT NO. 1457(VAR 04-047)
Applicant: WAILANA HERBST
Owner: RICHARD D. THURMAN
Request: Variance from Minimum Yards
Pursuant to Chapter 25, Zoning
Tax Map Key: 1-9-018:079, Lot 79

After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request subject to variance conditions. Variance Permit No. 1457 allows portions of the dwelling and Work Shop to remain, "AS-BUILT", on referenced TMK property according to the variance site plan map dated September 10, 2003. The variance allows portions of the dwelling ("HOUSE") to remain with minimum 12.75 feet side yard and attendant minimum 7.64 feet side yard clear space requirement from the northerly side boundary line and detached accessory building ("WORK SHOP") to remain with a minimum 14.34 feet side yard from the southerly side boundary line. The variance is from the property's minimum 15 feet side yard and attendant minimum 10 feet side yard clear space requirements, respectively, pursuant to the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 1, 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 space requirements, (a).

BACKGROUND AND FINDINGS

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1. **Location.** The subject property, Lot 79 containing 21,788 square feet, is within Volcano Cymbidium Acres, File Plan 1110, portion of Grant 11,132, and situated at Oloo, Puna, Hawaii.

The TMK property was zoned Agricultural (A-20a) by the County in 1967 and designated Agriculture "A" by the Land Use Commission (LUC). The property's land area consisting of approximately 0.50 + acre is below the minimum 20-acre lot size area required for the A-20a zone designation and is therefore deemed a "non-conforming" size lot.

2. **Variance Application-Site Plan.** The applicant submitted the variance application, attachments, and filing fee on or about April 2, 2004. The variance application's site plan map, dated September 10, 2003, was prepared by The Independent Hawaii Surveyors and is drawn to scale. The map denotes the location of the dwelling and workshop encroachments, "AS-BUILT" into the minimum yards and attendant open yard or clear space requirements.

The applicant's background states in part:

"Mr. Thurman bought the property "AS BUILT", on October 13, 2003, in doing so (sic) he inherited any encroachments on the property."

Note: The "WORK SHOP" position or encroachment into the affected side yard would be allowed pursuant to the "De Minimus" rule. However, after reviewing the variance request, the Planning Director elected to include and address the work shop encroachment issue in the subject variance.

The previous Zoning Code, allowed accessory buildings, i.e. water tank, etc., under certain circumstances, to be constructed within the minimum rear yard. This provision was modified and deleted when the current Zoning Code was approved on December 7, 1996 and ratified by the County Council. (Refer to further discussion in text).

3. **Agency Comments and Requirements-(VAR 04-047):**

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- a. The Department of Public Works (DPW) memorandum dated April 29, 2004, states in part:

“We reviewed the subject application forwarded by your memo dated April 13, 2004 and have the following comments:

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

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

- b. The State Department of Health (DOH) memorandum dated June 18, 2004 states:

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

4. **Notice to Surrounding Property Owners.** The applicant submitted copy of first and second notice sent to surrounding property owners and other submittals on May 4, 2004. According to the mailing receipts, it appears that the notices were mailed on April 5, 2004 and April 24, 2004, respectively, by the applicant.
5. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. The following objection letters and comments regarding the variance request were received:
- a. Objection letter from Gerald K.W. Wong (TMK: (3) 1-9-018:112) dated May 18, 2004.
- b. Objection letter from Shirley Okamoto (TMK: (3) 1-9-018:075 and 077) dated May 19, 2004.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant purchased the 33 year old dwelling and other improvements on or about October

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13, 2003 after the survey of the property and map was completed. The applicant, on behalf of the current owner, is trying to resolve the building encroachment issues built in the early 1970s. The variance application's site plan map was prepared by a surveyor and denotes the location of the dwelling, work shop (detached garage), and other site improvements, "AS BUILT" on "LOT 79". The site plan identifies the dwelling's and workshop's building position together with other building issues within the property's minimum side yards and attendant open yard requirements pursuant to the Hawaii County Zoning Code. County building records show the dwelling's water tank position within the rear yard was permitted and built before December 7, 1996. As such, the water tank's position within the property's rear yard is "non-conforming". The current owner became aware of dwelling and workshop building encroachment issues after the survey map was completed or during escrow to purchase the property. No evidence was found showing indifference or premeditation by previous owner(s) or previous builders to deliberately create or intentionally allow the dwelling and other building encroachments to be constructed within respective side yards. The dwelling, work shop (garage), and water tank improvements were built under valid building permit(s) and other construction permits issued by the County; and, inspections by the agencies 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:

1. Remove the building encroachments or redesigning or relocating the dwelling and workshop building fit within the correct building envelope prescribed by the Zoning Code.
2. Consolidation of Lot 79 with adjoining Lot(s)-Lot 77 (Vacant) and Lot 81 and resubdivision of the resulting consolidated property to modify property lines and adjust 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.

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It appears that the dwelling encroachment and workshop encroachment into the respective side yards are not physically and visually obtrusive from adjoining property(s) or rights-of-way. These encroachments were built before the survey map was completed or during escrow to sell the property. It appears the 33 year old dwelling and work shop encroachments within the affected yards were caused by mistake(s) by the previous owner(s) or builders in the 1970s to locate and position the foundation of both structures. The dwelling and work shop (garage) encroachments were not detected until a modern survey was completed and presented during escrow. It is felt that these 30 + year old building encroachments and the water tank position within the rear yard have not affected or altered the character of the subdivision and surrounding land patterns. Therefore, it is felt that the dwelling and workshop (detached garage) encroachments within the affected side yards and water tank position within the rear yard will not detract from the character of the immediate neighborhood or subdivision.

The subject variance application was acknowledged by letter dated April 13, 2004 and additional time to consider agency comments and complete the variance background was necessary. The applicant submitted a letter to allow additional time for the Planning Director shall render a decision on the subject variance to no later than July 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:

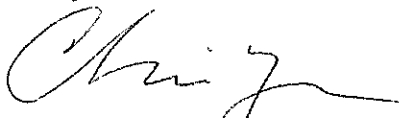
1. The applicant/owner, their assigns or successors shall be responsible for complying with all stated conditions of approval.
2. The applicant/owner(s), successors or assigns shall indemnify and hold the County of Hawaii harmless from and against any loss, liability, claim, or demand for the property 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 and workshop on the subject TMK property or Lot 79 will not meet Chapter 25, the Zoning Code's minimum side yard(s) and attendant minimum open yard requirements. The approval of this variance allows dwelling and work shop encroachments within the respective side yard(s) identified on the variance application's site plan map to remain, "AS BUILT", on the subject TMK property (LOT 79).
4. Any outstanding building and/or construction permits issued to the subject TMK property (Lot 79) shall be closed or "finaled" by the DPW-Building Division prior any change in title or future sale of the property.
5. No permit to allow an ohana dwelling shall be granted on subject TMK property (Lot 79), subject to provisions of the Hawaii County Zoning Code or State Law which may change from time to time.
6. 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

WRY:cd
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cc: Real Property Tax Office - Hilo
Planning Dept. - Kona
Gerald K.W. Wong
Shirley Okamoto