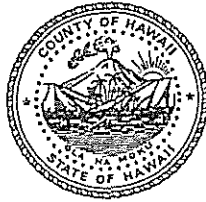


Harry Kim
Mayor



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 28, 2004

Mrs. Denise S. Nakanishi
PRUDENTIAL ORCHID
ISLE PROPERTIES
391 Kilauea Avenue
Hilo, HI 96720

Dear Mrs. Nakanishi:

VARIANCE PERMIT NO. 1459 (VAR 04-053)
Applicant: DENISE S. NAKANISHI
Owner: JESSE SIMS, ET AL.
Request: Variance from Minimum Yards
Pursuant to Chapter 25, Zoning
Tax Map Key: 1-3-022:048, Lot 17

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. 1459 allows the "AS-BUILT" position of the dwelling/water tank and other building improvements constructed on subject TMK property or Lot 17 with a minimum 19.22 feet to 19.91 feet side yard(s) and recognizes that the garage/storage building was permitted to be constructed with a minimum 20.0 feet rear yard and attendant minimum 14 feet rear yard open space requirements according to the variance site plan map and previous site and detailed building plans submitted with the variance application. The variance request is from subject TMK's minimum side yard and rear 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 space requirements, (a).

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BACKGROUND AND FINDINGS

1. **Location.** The subject property, Lot17 containing 1.000 acre, is within Leilani Estates Subdivision, and situated at Keahialaka, Puna, Hawaii.
2. **Variance Application-Site Plan.** The applicant submitted the variance application, attachments, and filing fee on or about May 7, 2004. The variance application's site plan map, dated May 2, 2000, was prepared by The Independent Hawaii Surveyors and is dated May 2, 2000 and drawn to scale (1" = 50'). The map denotes the location of the dwelling, water tank, and garage/storage encroachments, "AS-BUILT" into the property's minimum yards and open yard or clear space requirements stipulated by the current Zoning Code (1996, Ord. No. 96-160; ratified April 6, 1006).

The applicant's background states in part:

"The property under predecessor Fred and Diane Williams Building Permit Nos. 901831 as to the house and an amendment of the garage permit No. 912711 to correct an "as built" storage addition to an existing garage around 1994. No other information was available without lengthy investigation. Corrections to the garage storage were done by a licensed general contractor under the supervision of a licensed architect.

Owner was unaware of the violation regarding the storage addition setback violation until recently. The owner assumed the storage addition was legally positioned as attached to the existing garage which is legal, on-conforming to current setback requirement (sic). As to the house violation, the owner's accepted the survey map which disclosed this information with the intention of correcting this in the future. The catchment was regarded as de minimus per the survey report.

The garage, also noted on the survey report dated May 8, 2000 was found to be legal non-conforming to current code as it was originally so situated in 1991.

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The home as situated barely exceeds the de minimus recognition requirement and only applies to a small distance of the back corner of the home.”

3. **Agency Comments and Requirements-(VAR 04-053):**

- a. The State Department of Health (DOH) memorandum, dated May 28, 2004, states:

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

- b. The Department of Public Works (DPW) memorandum, dated June 1, 2004, states:

“We have reviewed the subject application forwarded by your memo dated May 18, 2004 and have no comments or objections to the request.”

4. **Notice to Surrounding Property Owners.** The applicant submitted mailing receipts or proof of mailing notice(s) to surrounding property owners. According to the mailing receipts, it appears that the notices were mailed on May 17, 2004 and May 28, 2004, respectively, by the applicant.

5. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. The following objection letter and/or comments regarding the variance request were received:

- a. Letter from Malcolm R. Lenson (TMK: (3) 1-3-022:017) dated May 20, 2004.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant purchased the 9 year old dwelling and other improvements on or about May 11, 2000 after the survey of the property and map, dated May 2, 2000, was completed. The applicant 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 dwelling, detached garage/storage,

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and other site improvements, "AS BUILT" on "LOT 17". The site plan identifies the dwelling, water tank, and detached garage/storage building's position together with other building issues within the property's minimum side and rear yards and attendant open yard requirements pursuant to the Hawaii County Zoning Code. County building records show the dwelling's garage position within the rear yard was permitted and built before December 7, 1996. As such, the garage/storage building position within the property's rear yard is "non-conforming".

The applicant, on behalf of Sims, Et al., became aware of the extent of the building encroachment issues during escrow to sell the property. No evidence was found showing indifference or premeditation by the applicant or owner(s)-Sims, Et al. to deliberately create or intentionally allow the dwelling, water tank, and garage/storage building encroachments to be built within the minimum yards and attendant minimum open yard space requirements of the Zoning Code. The dwelling, water tank, and garage/storage buildings and other site 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 or Sims, Et al. to address and correct the existing building encroachments include the following actions:

1. Remove the building encroachments or redesigning or relocating the dwelling, water tank, and garage/storage building fit within the correct building envelope prescribed by the Zoning Code.
2. Consolidation of Lot 17 with adjoining Lot(s) 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.

It appears that the dwelling and other building encroachment into the respective yards are not

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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 13 + year old dwelling, water tank, and garage/storage encroachments within the affected yards were caused by mistake(s) by the previous owner(s) or builders in the 1990s to locate and position the buildings. The dwelling, water tank and garage/storage encroachments were not detected until a modern survey was completed and presented during escrow nearly 4 years ago. It is felt that these 13 + year old building encroachments within the respective yards and open space requirements have not affected or altered the character of the subdivision and surrounding land patterns. Therefore, it is felt that the dwelling, water tank and garage/storage encroachments within the affected yards of the present Zoning Code will not detract from the character of the immediate neighborhood or subdivision.

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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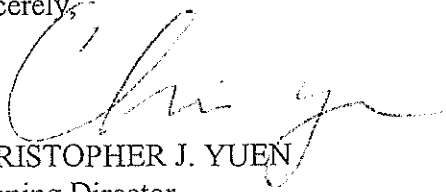
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3. Portions of a dwelling, detached water tank, and detached garage-storage building on the subject TMK property or Lot 17 will not meet Chapter 25, the Zoning Code's minimum side yard, rear yard, and attendant minimum rear yard open space requirements. The approval of this variance allows dwelling, water tank, and garage-storage building encroachments and building positions identified on the variance site plan map dated May 2, 2000 to remain, "AS BUILT", on the subject TMK property (LOT 17).
4. Any outstanding building and/or construction permits issued to the subject TMK property (Lot 17) 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 17), 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
Malcolm R. Lenson