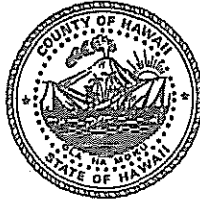


Harry Kim
Mayor



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 26, 2005

Jennifer L. Zelko, Esq.
CARLSMITH BALL LLP
P. O. Box 686
Hilo, HI 96721-0686

Dear Ms. Zelko:

VARIANCE PERMIT NO. 04-093 (VAR 04-093)

**Applicant: JENNIFER L. ZELKO, ESQ.-
CARLSMITH BALL LLP**

Owners: JOHN KAI, ET AL.

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

Tax Map Key: 2-4-059:051, Lot 74

After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No. 04-093 allows dwelling/attached carport and attendant roof eaves encroachments to remain on the subject TMK property, Lot 74, "AS-BUILT", with a minimum 6.5 feet side yard and attendant minimum 2.5 feet side yard open space and attached carport with minimum 7.7 side yard, respectively, according to the variance site plan map submittal dated May 14, 2004. The variance request is from the minimum yard requirements of the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 1, Section 25-5-7, Minimum yards, (a) (1) (B), and Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open space requirements, (a).

BACKGROUND AND FINDINGS

1. **Location.** The subject property, Lot 74 containing 7916 square feet, is within "MOHOULI SUBDIVISION, SECTION 1", File Plan No. 1168, and situated at Waiakea, South Hilo, Hawaii.

Hawaii County is an equal opportunity provider and employer.

JUL 28 2005

Jennifer L. Zelko, Esq.
July 26, 2005
Page 2

The property is zoned Single-Family Residential (RS-7.5) by the County and designated Urban "U" by the State of Hawaii-Land Use Commission (LUC).

2. **Variance Application-Site Plan.** The applicant submitted the variance application, attachments, and filing fee to the Planning Department on or about November 3, 2004. The applicant's variance application site plan or map drawing is drawn to scale and dated May 14, 2004. The variance application's site plan or survey map by Paul H. Murray & Associates, LLC denotes the building setback lines (building envelope), "DWELLING/CARPORT" position and other site improvements on "LOT 74 7,916 SQ. FT."

Note: The variance request and site plan map does not identify any cesspool location(s) or Independent Wastewater System (IWS) for any dwelling improvements located on "LOT 74". The location of any perimeter fence or any wall improvements straddling or along property lines shall be addressed and resolved between respective owner(s).

3. **Agency Comments and Requirements-(VAR 04-093):**

- a. The Department of Public Works (DPW) response dated December 16, 2004, states in part:

"We have reviewed the subject application forwarded by your memo dated December 13, 2004 and have the following comments.

Approval of the application shall be conditioned as noted below.

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.

Section 504(b) Fire Resistance of Walls, Projections beyond the exterior wall shall not exceed beyond...(sic).

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

Jennifer L. Zelko, Esq
July 26, 2005
Page 3

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

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 the first and second notice was mailed on December 10, 2004 and February 4, 2005, respectively, according to submittals received.
5. **Comments from Surrounding Property Owners or Public.** No further written agency comments or objection letters from surrounding property owners and public were received.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The building encroachment problems were identified pursuant to a survey map or variance site plan map dated May 14, 2004. The applicant, on behalf of the current owners, filed the variance request and application to address or resolve building encroachment issues. The site plan map was prepared by a surveyor and shows the dwelling/carport and other site improvements, “AS BUILT”, upon “LOT 74”. Portions of the dwelling/carport/roof eaves are constructed beyond the denoted building setback lines or outside the building envelope into the respective minimum yards pursuant to the Hawaii County Zoning Code. The current owners became aware of the dwelling encroachment issues after the survey map was prepared. No evidence has been found to show indifference or premeditation by the past owner(s)/builders or current owners to deliberately create or intentionally allow the building encroachment problems to occur. It appears that the original dwelling improvements on Lot 74 were constructed between 1970 and 1975 according to applicant and County building permit(s) records. It appears that building inspections of the premises by the respective agencies during the construction of the building improvements did not disclose any building encroachment issues or building setback irregularities at that time.

ALTERNATIVES

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

1. Removing the existing building encroachments or redesigning or relocating the dwelling to fit within the correct building envelope prescribed by the Zoning Code.

Jennifer L. Zelko
July 26, 2005
Page 4

2. Consolidation with portions of the adjoining property(s)-Lot 73 and Lot 75 and resubdivision of the resultant 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 dwelling encroachments constructed on or about 1975 or between 1970 and 1975 within the affected yards are not physically noticeable or visually obtrusive from adjacent property(s) or the right-of-way. It appears that these 30 + year old building encroachments do not depreciate or detract from the character of the surrounding neighborhood, public uses, and surrounding land pattern. Therefore, it is felt that these building encroachments within the affected 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 December 13, 2004. Additional time to consider agency comments was deemed necessary. The applicant agreed to extend the date on which the Planning Director shall render a decision on the subject variance to no later than June 30, 2005.

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

Jennifer L. Zelko, Esq
July 26, 2005
Page 5

3. 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 a "Dwelling/Carport" located on "LOT 74" will not meet Chapter 25, the Zoning Code's minimum yard requirements according to the variance application's site plan map dated May 14, 2004. The approval of this variance allows those dwelling/carport improvements including roof eaves within the minimum yards identified on the variance application's site plan map, "AS BUILT", to remain on the subject TMK property or "LOT 74".
4. No permit shall be granted to allow an ohana dwelling or building permit issued to allow construction of an "ohana" dwelling shall be granted to the subject TMK property (LOT 74), subject to provisions of the Zoning Code or State Law which may change from time to time.
5. Future building improvements and permitted uses on the subject tax map key property are 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: je
P:\WP60\WRY\FORMLETTVARAPPZCTMK24059051.ZELKOCARLSMITH

xc: Real Property Tax - Hilo
Planning Department - Kona