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Mayor



Christopher J. Yuen
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County of Hawaii
PLANNING DEPARTMENT

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

October 13, 2006

Ms. Terisita R. Garcia
103 Kupulau Road
Hilo, HI 96720

Dear Ms. Garcia:

VARIANCE-05-018 (DENIAL)

Applicant: TERISITA R. GARCIA
Owner: TERISITA R. GARCIA
Request: Variance from Chapter 25, Zoning
Tax Map Key: 2-4-020:039, Lot 5

After reviewing your variance application, the Planning Director denies your variance request and application. Variance Application-VAR 05-018 requested variance to allow portions of a dwelling/garage/lanai to remain on Lot 5, "AS-BUILT", within respective minimum 4.0 feet and minimum 5.5 feet side yard(s) and attendant 2.0 feet and 3.0 feet minimum side yard open space between the existing edge of the roof eave(s) and respective side boundary lines in lieu of the minimum 8.00 feet side yard(s) and attendant minimum 4.00 feet side yard open space requirements according to the variance site plan map and other plans submitted with the variance application. The variance is from the TMK property's minimum side yard requirements pursuant to 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, Grant 117001 or Lot 5 containing 6,655 square feet, is situated at the intersection of Kupulau Road and Maluhia Street within an area formerly called "Waiakea Camp 6", portion of Grant 10417, being a portion of Lot 1004, Waiakea Homesteads 2nd. Series, and situated at Waiakea, South Hilo, Hawaii. The property's address is 103 Kupulau Road.

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

2. **Variance Application-Site Plan.** The applicant submitted the revised variance application, attachments, and filing fee on or about September 15, 2005 to the Planning Department. The site plan and other drawings submitted with the variance application denote the location of existing dwelling-carport and proposed open patio addition, "AS-BUILT". However, the open patio addition and portions of the proposed open patio addition were constructed without a building permit; and portions of the open patio, "AS-BUILT" do not meet the minimum yard and open space requirements of the Hawaii County Zoning Code.

The applicant-owner was issued a Notice of Violation and Order (ZCV 04-093) letter dated November 22, 2004 for the open patio addition constructed without a building permit.

The applicant's submitted background information dated March 18, and April 30, 2005; and, Notice of Violation and Order letter dated November 22, 2004. (Refer to variance file).

3. **Agency Comments and Requirements-VAR 05-018:**

- a. The County of Hawaii-Fire Department (HFD) memorandum dated October 4, 2005 states:

"We have no comments to offer at this time in reference to the above-mentioned Variance application request."

- b. The Department of Public Works (DPW) memorandum dated October 12, 2005 states in part:

"We have reviewed the subject application forwarded by your memo dated September 21, 2005 and offer the following comments for your consideration.

The subject parcel is located within Flood Zone AE as designated on the Flood Insurance Rate Map (FIRM) by the Federal Emergency Management Agency (FEMA). Flood Zone AE is the Special Flood Hazard Area inundated by the 100-year flood where base flood elevations have been determined.

Construction within the designated FEMA flood zone shall comply with the requirements of Chapter 27, Flood Control, of the Hawaii County Code.

The patio to the left of the carport measuring 26'x10'6" would be acceptable if the plans were stamped by an Architect or Structural Engineer. The patio at the back of the house measuring 6'x64' would require overhangs to be of one-hour fire-resistive construction. The main concern would be whether light and ventilation for the dwelling is compromised. This couldn't be determined with the plans submitted for variance."

- c. The State Department of Health (DOH) memorandum dated October 17, 2005 states:

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

4. **County Building Records:**

County building and tax records indicate at least 4-Building Permits and associated electrical and plumbing permits were issued to subject TMK property between 1977 and 1999. It appears that the original dwelling on the subject TMK property was destroyed by fire in 1998 and replaced by a new dwelling in 1999.

5. **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 applicant mailed first a first notice on September 23, 2005. Attempts to contact the applicant by telephone regarding sending a second notice were unsuccessful.

6. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. The following letter(s) from surrounding property owners were received:

- a. Objection letter from Mable K. Andrews dated August 10, 2006.

SPECIAL AND UNUSUAL CIRCUMSTANCES

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The applicant submitted a site plan map and other building drawings with the variance application denoting the location and position of the "open patio" improvements, "AS BUILT". Portions of the proposed open patio were constructed into minimum 8 feet side yards and respective 4 feet side yard open space required by the Zoning Code. According to the variance submittals, it appears that the applicant constructed the "open patio" prior to November 22, 2004. The applicant is asking for a variance from the Zoning Code minimum yards in order prior to applying for an "after-the-fact" building permit.

According to the objection letter received, it appears that the applicant-owner has continued to construct the "open patio" without County permits. Some of the non-permitted or "NEW PROPOSED OPEN PATIO" were constructed outside the property's building envelope into the property's minimum side yards and attendant minimum side yard open spaces.

Therefore, considering the variance background, variance submittals, and other information received, it is felt there are no special or unusual circumstances applying to the subject property which exist either to a degree which deprive the applicant or owner(s) of substantial property rights that would otherwise be available, or to a degree which obviously interferes with the best use or manner of development of the subject property.

ALTERNATIVES

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

1. Remove the building encroachments within the affected minimum yard(s).
2. Redesign and relocate the additional dwelling improvements to fit within the correct building envelope prescribed by the Zoning Code, and/or other similar design alternatives, etc.
3. Consolidate the subject TMK property with the adjoining property TMK property and resubdivide the resultant consolidated lot to modify the property geometry and/or change the metes and bounds descriptions in accordance with the minimum yard requirements of the Zoning Code.

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. The "NEW PROPOSED OPEN PATIO" addition identified on the variance site plan map was built and completed by the applicant-owner without a building permit.

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It appears that the proposed "open patio" building addition constructed into the affected side yard and respective side yard open space requirements are physically and visually obtrusive from adjacent property(s). The existing "open patio" addition and building encroachment(s) within the affected side yard and open spaces, "AS-BUILT", were built by the applicant-owner without a building permit. It appears that the "open patio" location and roof run-off during heavy rains into adjoining property have detracted from the character of the surrounding neighborhood; and, the building character and additions, "AS-BUILT", deviate from existing and surrounding building patterns. Therefore, in view of the earlier violation letter issued to the applicant-owner and other complaints received concerning the open patio addition and open patio encroachments within the property's minimum side yards and open spaces, and drainage or roof run-off unto adjoining property, etc., the open patio addition constructed without a building permit by the applicant-owner detract from and have affected the character of the neighborhood.

It appears the applicant-owner has adequate room within the building envelope of the subject TMK property established by the Zoning Code to locate and attach a proposed "open patio" addition. The TMK property's size, land topography, "lay of the land", and other natural features do not exhibit any unusual land features or building limitations. In view of the original violation letter and recent letter from an adjoining property owner, it appears the applicant-owner has continued to construct building improvements on the subject TMK property without securing a building permit from the DPW. It appears that the decision to construct the addition or open patio addition and building improvements into the property's minimum side yards was a deliberate decision by the applicant and cannot be considered a hardship or special or unusual circumstance in favor of the variance request.

The subject variance application was acknowledged by letter dated September 21, 2006 and additional time to confirm agency requirements, variance procedures, and study objection letter(s) received by the Planning Department after the variance application was filed were taken into consideration. The Planning Department tried to contact the applicant-owner to verify required second notice, objection letters-complaints; and extension of time to send the required second notice and render a decision on the subject application. No oral or written response was received from the applicant-owner.

Based on the findings, inspection of the premises by the Planning Department and violation letter dated November 22, 2004, and applicant-owner's decision to ignore county building permit requirements, the approval of the variance request to permit or allow the existing open patio addition to remain within the affected side yards and attendant side yard open space requirements, "AS-BUILT", would not 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.

PLANNING DIRECTOR'S DECISION AND VARIANCE CONDITIONS

This denial of your variance request requires you to immediately remove the non-permitted improvements and be aware of the following deadline and other requirements:

1. The non-permitted open patio addition, "AS-BUILT", constructed within the respective minimum side yard(s) identified on the variance application's site plan or building improvements described and identified in the earlier violation letter dated November 22, 2004 sent to the applicant-owner shall be removed on or before **December 15, 2006**. Upon completion of the foregoing corrective action, you are responsible for contacting the Hilo Zoning Inspector-Mr. Robert Usugawa at (808) 961-8288 by telephone and in writing to the Planning Director to verify the completion of corrective action.
2. Any future building improvements and permitted uses on the subject TMK property shall be subject to State law and County ordinances and regulations pertaining to building construction and building occupancy.

In accordance with a recent charter amendment and Ordinance No. 99-112, you may appeal the director's decision and request the following:

- (a) Any person aggrieved by the decision of the director in the administration or application of this chapter, may, within thirty days after the date of the director's written decision, appeal the decision to the board of appeals.
- (b) A person is aggrieved by a decision of the director if:
 - (1) The person has an interest in the subject matter of the decision that is so directly and immediately affected, that the person's interest is clearly distinguishable from that of the general public: and
 - (2) The person is or will be adversely affected by the decision.
- (c) An appeal shall be in writing, in the form prescribed by the board of appeals and shall specify the person's interest in the subject matter of the appeal and the grounds of the appeal. A filing fee of \$250 shall accompany any such appeal. The person appealing a decision of the director shall provide a copy of the appeal to the director and to the owners of the affected property and shall provide the board of appeals with the proof of service.

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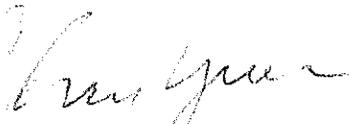
- (d) The appellant, the owners of the affected property, and the director shall be parties to an appeal. Other persons may be admitted as parties to an appeal. Other persons may be admitted as parties to an appeal, as permitted by the board of appeals.

The board of appeals may affirm the decision of the director, or it may reverse or modify the decision, or it may reverse or modify the decision or remand the decision with appropriate instructions if based upon the preponderance of evidence the board finds that:

- (1) The director erred in its decision; or
- (2) The decision violated this chapter or other applicable law; or
- (3) The decision was arbitrary or capricious or characterized by and abuse of discretion or clearly unwarranted exercise of discretion.

In view of the above, we have enclosed GENERAL PETITION FOR APPEAL OF DECISIONS BY PLANNING DIRECTOR.

Sincerely,



CHRISTOPHER J. YUEN
Planning Director

WRY:cd

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cc: Real Property Tax Office-Hilo
Zoning Inspector-Hilo
Mable K. Andrews