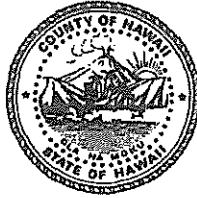


Harry Kim  
Mayor



Christopher J. Yuen  
Director

Brad Kurokawa, ASLA  
LEED® AP  
Deputy Director

County of Hawaii  
PLANNING DEPARTMENT

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

April 28, 2006

Mr. Roy A. Vitousek III, Esq.  
CADES-SCHUTTE  
75-170 Hualalai Road, Suite B-303  
Kailua-Kona, HI 96740

Dear Mr. Vitousek:

**VARIANCE PERMIT-VAR 05-050**

**Applicant:** ROY A. VITOUSEK, III, ESQ.  
**Owner:** JUDY EMANUEL  
**Request:** Variance from Chapter 25, Zoning,  
Minimum yards  
**Tax Map Key:** 7-8-014:082

After reviewing your application and the information and plans submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit VAR 05-050 permits proposed addition to a dwelling constructed on the referenced TMK property prior to 1967. The variance request is Hawaii County Code, Chapter 25, Zoning, Article 5, Division 1, Section 25-5-7, Minimum yards, (a)(1)(A)(B), Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open space requirements(a), and Article 4, Division 6, Nonconforming Uses and Buildings, Section 25-4-65, Expansion of nonconforming use; changes to building with nonconforming use.

**BACKGROUND AND FINDINGS**

1. **Location.** The subject property, containing approximately 0.21 acre, is in the Kahaluu Beach Lots, on the makai (ocean) side of Alii Drive and situated 700 feet (northerly) from the Kahaluu Beach Park. The property's street address is 78-  
7754 Alii Drive.

665A.

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

2. **Variance Application-Site Plan.** The applicant submitted the variance application, attachments, and filing fee on or about May 25, 2005 to the Kona Planning Department. The variance application's site plan and preliminary plans for the proposed addition to the dwelling are drawn to scale. This variance site plan map denotes the "AS-BUILT" location of the dwelling and proposed addition. The proposed addition will be situated within the TMK property's minimum front and respective side yard (+/-).

The applicant's background states in part:

"The applicant requests this variance to allow her to add a loft onto the house. The special circumstance which applies to the subject property is that the existing house was built on the property in 1964. The structure existed well before the December 7, 1966, and before May 24, 1967, and is therefore a nonconforming building as defined in Section 25-4-61 of the Hawaii County Zoning Code. Building plan showing proposed loft dimensions is attached. Without the variance, the applicant may be deprived of her rights to perform reasonable upgrades and repair to the property which would otherwise be available."

3. **Agency Comments and Requirements-VAR 05-050:**

- a. The Department of Public Works (DPW) memorandum dated September 2, 2005 states in part:

1. Buildings shall conform to all requirements of code and statutes pertaining to building construction, (see attached memorandum from our Building Division).
2. All driveway connections to a County road shall conform to Chapter 22, Streets and Sidewalks, of the Hawaii County Code.
3. The applicant shall remove any encroachments or obstructions within the County right-of-way."

The DPW-Building Division memorandum dated September 1, 2005 states in part:

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

All new building construction shall conform to current code requirements.

The minimum setbacks shall be maintained as follows:

Residential structures-3 ft. side, 3 ft. rear

Commercial structures-5 ft. side, 5 ft. rear”

Note: County building records show a building permit (915758) for “REPAIR TO ROOF DAMAGE” and electrical permit (E915622) were issued by the DPW to the subject TMK property circa 1991. Both permits were closed by the DPW.

- b. The State Department of Health (DOH) memorandum dated September 13, 2005 states:

“The Health 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 first and second notices were mailed on August 22, 2005 and August 25, 2006, respectively, by the applicant. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on or about August 18, 2005.
- 5. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. The following letter(s) from surrounding property owner(s) were received:
  - 5a. Letter from Simmy McMichael dated September 1, 2005 received on or about September 7, 2005.
  - 5b. (Copies) of a fax and objection letter from Alan J. Pollak dated September 6, 2005 and other submittals received on or about September 8, 2005.
  - 5c. Letter from Robert Johnson (Kona Seaspray) dated September 8, 2005 received on or about September 15, 2005.
  - 5d. 2-Letter(s) from John R. Sudnikovich and Judith Sudnikovich dated September 12, 2005 received on or about September 19, 2005.

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- 5e. Letter from Alan Gugino dated September 19, 2005 received on or about October 6, 2005.

**Note:** Most of the objection letters and/or concerns pertain to deed covenants, conditions, and restrictions and lot "Use" within the Kahaalu Beach Lots. Private deed restrictions are not enforced by the County and there is case law that a one story covenant is not enforceable. Pursuant to the preliminary building drawings submitted with the variance application the existing dwelling's height is approximately 14 feet; and, the proposed building improvements will result in a dwelling with roof heights ranging from 14 feet to 23 feet. The overall height of the dwelling and proposed addition is below the maximum 35 feet height limit, pursuant to Chapter 25, Zoning, Article 5, Zoning District Regulations, Division 1, RS, Single-Family Residential Districts, Section 25-5-4, Height limit.

### **SPECIAL AND UNUSUAL CIRCUMSTANCES**

According to the applicant, the original dwelling's was built or established on subject TMK property circa 1964 before the Zoning Code was adopted in 1967 and subsequent adoption of CZM-SMA law.

The existing dwelling's area or position on subject TMK property is denoted on the site plan. The dwelling's footprint or portions of the original living area are within the property's minimum 15 feet front yard, minimum 8 feet side (+/-) yard, and shoreline setback area (20 feet wide) are deemed to be non-conforming pursuant to the Zoning Code.

In this instance, the TMK property's "Building line" pursuant to the Zoning Code and minimum "20 feet shoreline" pursuant to CZM-SMA requirements creates a narrow building envelope within the subject property.

### **ALTERNATIVES**

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

1. Redesigning the (dwelling) or modifying the design for the addition to be sited within the building envelope created by Shoreline and Zoning Code.
2. Consolidation of the subject TMK property with a portion of the adjoining property (Alii Drive-Right-of-Way) and resubdivision and adjustment of minimum yards from revised boundary lines, etc.

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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.

After the Zoning Code was adopted in 1967, portions of the original dwelling's living area and respective roof eaves within the TMK property's minimum 15 feet front yard and minimum 8 feet side yard (+/-) became non-conforming. In addition the site plan purports that portions of the original dwelling are within the minimum 20 feet wide shoreline or shoreline setback area of the subject TMK property. The current owner is proposing an addition to the original dwelling or upon the original building "footprint" and roof line to maintain the building's geometry. The applicant wants the dwelling addition to harmonize with the lower floor plan; and, preserve the building's current geometry which creates a dwelling that does not detract from building character exhibited within the immediate neighborhood. Therefore, it is felt that the proposed rehabilitation of the interior floor plan of the 42 + year old dwelling and "loft" addition or expansion of the non-conforming portion of the dwelling within the front yard and affected side yard (+/-) will not detract from the building character of the immediate neighborhood or the subdivision, subject to variance conditions requiring the owner to secure necessary building and construction permits from the DPW. The proposed interior renovations and building addition are outside the minimum 20 feet wide shoreline area denoted on the variance site map.

The subject variance application was acknowledged by letter dated August 11, 2005 and additional time to review agency comments and objection letter(s) received was necessary. The applicant, on behalf of the owner, agreed to extend the date on which the Planning Director shall render a decision on the subject variance application.

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(s), their assigns or successors shall be responsible for complying with all stated conditions of approval.

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2. The applicant/owner(s), the 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/owner, 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 the proposed building addition to existing non-conforming dwelling will not meet Chapter 25, the Zoning Code's minimum front yard and minimum side yard (+/-) and attendant minimum front yard open space and minimum side yard open space requirements. The approval of this variance allows the proposed addition to be constructed in accordance with the applicant's site plan.
4. The applicant or current owner shall submit Special Management Area Use Permit Assessment Application and comply with SMA conditions or requirements prior to applying for a building permit to construct the proposed dwelling addition permitted by subject variance. The building permit and any associated permits for the proposed addition shall be closed or "finaled" by the DPW-Building prior to sale of the property or transfer of title of the property by the current owner to others.
5. 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, subject to provisions of the 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.

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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/DSA:cd  
P:\WP60\WRY\FORMLETT\VAR05-050APPZCTMK78014082.VITOUSEK-EMANUEL

Enclosure (SMA-Use Permit Assessment Application)

cc: Real Property Tax Office-Kona (Ltr. only)  
Simmy McMichael (Ltr. only)  
Alan J. Pollak (Ltr. only)  
Robert Johnson (Ltr. only)  
John R. Sudnikovich and Judith Sudnikovich (Ltr. only)  
Alan Gugino (Ltr. only)