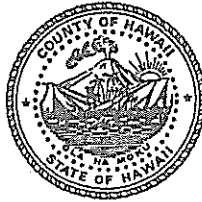


Harry Kim
Mayor



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

October 25, 2005

Mr. Geraldo Scatena, Esq.
PACIFIC STATES LEGAL GROUP
Pottery Terrace, Plumeria Building
75-5995 Kuakini Highway, Suite 441
Kailua-Kona, HI 96740

Dear Mr. Scatena:

VARIANCE PERMIT NO. (WH) VAR 05-074
Applicant: GERALDO SCATENA, ESQ.
Owners: STELLA BARBARA MAZIARZ
Request: Variance from Minimum Yards
Pursuant to Chapter 25, Zoning
Tax Map Key: 7-5-035:001, Lot 4

After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No. 05-074 allows portions of a 1-story dwelling to remain on Lot 4, "AS-BUILT", with a minimum 7.26 feet to minimum 7.44 side yard(s) and attendant minimum 3.03 feet side yard open space in lieu of the minimum 8.00 feet side yard and attendant minimum 4.00 feet side yard open space requirements according to the variance site plan map dated and signed on June 14, 2005. The variance request is from the subject TMK property's minimum yard and attendant open space requirements pursuant to the to 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 4 containing 7433 square feet, within Alii Point Subdivision, Land Court Application 1793, Map 2, and Royal Patent No. 9177, Apana 2 to Kauila, is situated at Puapuaa 2nd, North Kona, Hawaii.

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The property is zoned Multiple-family (RM-1.5) by the County and designated Urban "U" by the Land Use Commission (LUC). The property is within the Special Management Area (SMA).

2. **Variance Application-Site Plan**. The applicant submitted the variance application, attachments, and filing fee on or about July 20, 2005 to the Planning Department (Kona). The variance application site plan map, drawn to scale, was prepared by a surveyor and is dated and signed on June 14, 2005. The site plan map denotes the location of the "SINGLE STORY RESIDENCE/LANAI/EAVE" encroachments, "AS-BUILT" into respective side yards and attendant side yard open space requirements.

The applicant's background states in part:

"The design of the recently constructed home inadvertently caused the southeast corner of the roof overhang to encroach into the required setback by .97 feet (11.64 inches)."

"As a mitigating factor, it should be noted that the side of the home on which the offending corner sits is adjacent to the subdivision's common area, specifically, it sits adjacent to the community's tennis court. Thus, there is no residence on the adjacent land and the encroachment does not adversely affect such residence."

3. **Agency Comments and Requirements-(WH) VAR 05-074:**

- a. The Department of Public Works (DPW) memorandum dated September 7, 2005, states in part:

"We reviewed the subject application and we have no comments or objections."

- b. The State Department of Health (DOH) memorandum dated September 15, 2005 states:

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

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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 18, 2005 and August 30, 2005, respectively, by the applicant.
5. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. No written comments or objections from surrounding property owners or public were received.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant, on behalf of the current owner, 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/garage/lanai/roof eave line and other site improvements, "AS BUILT" on "LOT NO. 4". The variance site plan map identifies the dwelling's building position together with the building encroachments within the property's minimum side yards and attendant open yard requirements pursuant to the Hawaii County Zoning Code. The applicant and/or current owner became aware of the 2 + year old building encroachment issues within the affected yards after the survey map was completed. No evidence has been found to show indifference or premeditation by the owners or builders to deliberately create or intentionally allow the building encroachments to be built. The dwelling and site improvements were constructed pursuant to a County building permit issued to a previous owner in 2002 together with other required construction permits; and, initial inspections by the County 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 to fit within the correct building envelope prescribed by the Zoning Code.
2. Consolidation of Lot 4 with adjoining lots and resubdivision to modify common property lines and adjust minimum yards.

INTENT AND PURPOSE

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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 into the minimum yards are not physically and visually obtrusive from adjacent property(s) or rights-of-way. It appears the dwelling/lanai or roof eave/gutter encroachments do not depreciate or detract from the character of the surrounding neighborhood or surrounding building or land patterns. Therefore, it is felt that the existing dwelling/lanai and roof eave encroachments within the side yards identified on the variance application 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 August 23, 2005. The applicant agreed for an extension of time to October 31, 2005 to complete the variance background report and render a decision on the subject variance.

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:

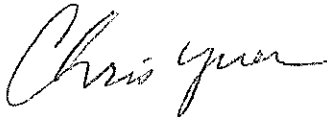
1. The applicant/owner, their assigns or successors shall be responsible for complying with all stated conditions of approval.
2. The applicant/owner(s), successors or assigns shall indemnify and hold the County of Hawaii harmless from and against any loss, liability, claim, or demand for the property 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 roof eave/gutter on the subject TMK property or Lot 4 will not meet Chapter 25, the Zoning Code's minimum yard and attendant minimum open yard requirements. The approval of this variance allows dwelling and lanai eave/gutter encroachments identified on the variance application's site plan map prepared by Pattison Land Surveying, Inc. dated and signed on June 14, 2005 to remain, "AS BUILT" on Lot No. 4 or subject TMK property.
4. 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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xc: Real Property Tax Office-Kona