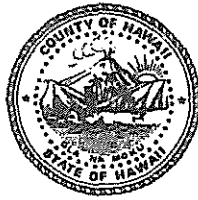


Harry Kim
Mayor



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

May 12, 2006

Ms. Gail Nellis
RR 2 Box 3960
Pahoa, HI 96778

Dear Ms. Nellis:

VARIANCE PERMIT-VAR 06-005

Applicant: GAIL NELLIS
Owners: MICHAEL POGGENBURG, ET AL.
Request: Variance from Chapter 25, Zoning,
Minimum Yards

Tax Map Key: 1-3-031:025, Lot 54

After reviewing your application and the information submitted, the Planning Director certifies approval of Variance Permit-VAR 06-005 subject to variance conditions. The variance permits portions of a dwelling/deck/eaves to remain on Lot 54, "AS-BUILT", with a minimum 15.0 feet to minimum 18.5 feet side yard and attendant minimum 7.0 feet to minimum 7.7 feet side yard open space in lieu of minimum 20.00 feet side yard and minimum 14.00 feet side yard open space requirements, according to the variance site plan map dated September 19, 2005. The variance is from the TMK property's minimum side yard and required minimum side yard open yard space 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).

BACKGROUND AND FINDINGS

1. **Location.** The subject property, Lot 54 containing 1.000 acre, is within Block 33 of Leilani Estates Subdivision, and situated at Keahialaka, Puna, Hawaii.

The property is zoned Agricultural (A-1a) by the County and designated Agriculture or "A" by the Land Use Commission (LUC).

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2. **Variance Application-Site Plan.** The applicant submitted the variance application, attachments, and filing fee on or about January 17, 2006. The variance application's site plan map is drawn to scale and prepared by Paul H. Murray & Associates. The variance site plan map, dated September 19, 2005, denotes portions of the "DWELLING/DECK/EAVES" were built within a minimum 20 feet side yard and minimum 14 feet side yard open space of "LOT 54" or subject TMK property.

The applicant's variance submittals includes a "DEFAULT JUDGMENT AGAINST DEFENDENTS BYRON K. AYOSO, AMADA M. AYOSO, JEREMY K. AYOSO and variance application's background report states in part:

"MR. AYOSO STOLE MONEY FROM US, MISREPRESENTED THAT HE WAS A CONTRACTOR, INCORRECTLY PLACED THE FOUNDATION AND WE DID NOT KNOW OF THIS SITUATION WAS COMPLETED AND WAS IN ESCREW. (Sic) WE HAVE SINCE LOST THE BUYER."

Note: The variance site plan map does not identify the location of the cesspool or Independent Wastewater System (IWS).

3. **County Building Records:**

Pursuant to a copy of plans forwarded to this office from Leilani Community Association, it appears that the Dwelling/Deck/Eaves on Lot 54 are being constructed according to Building Permit "B2004-2224H".

4. **Agency Comments and Requirements-VAR 06-005:**

- a. The State Department of Health (DOH) forwarded a memorandum dated April 19, 2006 and May 1, 2006. (Refer to memorandums in variance file).
- b. The Department of Public Works (DPW) memorandum dated April 5, 2006 states in part:

"NO COMMENTS"

5. **Notice to Surrounding Property Owners.** Proof of mailing notices to surrounding property owners was submitted to the Planning Department. For the record, the first and second notices were mailed on March 27, 2006 and April 4, 2006, respectively, by the applicant. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on April 3, 2006.
6. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. The following letters/comments or inquiry were received:
 - 6a. Objection letter dated April 4, 2006 from Leilani Community Association.
 - 6b. Letter dated April 27, 2006 from James E. T. Koshiba, Esq.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant or current owners submitted the variance application to address or resolve the dwelling/deck encroachments within the property's minimum 20 feet side yard and minimum 14 feet side yard open space. The variance application's site plan map was prepared by a surveyor and denotes the location of the "DWELLING/DECK/EAVES" and other site improvements on "LOT 39", "AS BUILT". The current owners became aware of building encroachment issues after the dwelling/deck improvements were completed and/or subsequent to a complaint.

It appears that the foundation of the original dwelling improvements was completed by the owner's original builder or contractor. According to above cited copy of a court document submitted with the variance application, it appears that the misplacement of the dwelling/deck or dwelling "foundation" was committed by the original builder and/or contractor. It appears that the dwelling/deck/eaves within one of the property's side yards went unnoticed during initial construction and was discovered after a complaint against the owners was filed by others. No evidence has been found to show indifference or premeditation by the current owners to intentionally allow portions of the dwelling/deck encroachment to be constructed into the property's side (south) yard.

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.

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2. Consolidation of Lot 54 with adjoining lot (TMK: 1-3-031:026, Lot 53) and resubdivision to modify property lines or 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 subject dwelling/deck encroachments in the property's minimum 20 feet side yard were recently constructed by the owner's original contractor. It appears that these recent building encroachments within the property's side yard were not discovered until a complaint was filed. The applicant/owners filed the variance application to address the dwelling's position on Lot 54 and agreed to install a CRM wall or fence and landscaping to act as a buffer between Lot 54 and adjoining property (Lot 53). In view of the foregoing, it is felt that the dwelling/deck encroachments into the property's side yard identified on the variance application's site plan map can be buffered by the wall/fence/landscaping and will not detract from the character of the immediate neighborhood or the subdivision.

The subject variance application was acknowledged by letter dated March 17, 2006 and additional time to complete the variance background report and consider agency comments was necessary. The applicant agreed for an extension of time to complete the variance background report and render a decision on the subject variance to May 16, 2006.

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.
3. Portions of the dwelling/deck located on "LOT 54" will not meet the property's minimum side yard and side yard opens space requirements pursuant to Chapter 25, the Zoning Code according to the variance application's site plan map dated September 19, 2005. The approval of this variance permits the dwelling/deck improvements to remain on "LOT 54", "AS BUILT", according to the variance site plan map dated September 19, 2005.

The applicant/owner shall construct a 70 feet long CRM or wooden fence (maximum 6 feet high) pursuant to "Fencing Proposal" and install a landscape buffer to screen the dwelling/deck and fence on Lot 54. The beginning or location of the proposed CRM wall or wooden fence (70 feet length) is on and along Lot 54's side boundary shared with adjoining "LOT 53" and located approximately 140 feet from a "pipe" along Kaupili Street. The fence and landscaping buffer are denoted on a site plan map in variance file. The required wall or fence improvements including landscaping buffer shall be installed prior to issuance of an occupancy permit or before July 31, 2006.

The applicant or current owners shall address the status of any "open" Building Permit and associated construction permits issued to subject TMK property by the DPW-Building Division (Hilo). The required wall or fence improvements, landscaping buffer, etc. shall be completed prior to occupancy of the dwelling and any "open" building permit and associated construction permits issued to subject TMK property shall be closed or "finaled" by the DPW-Building Division on or before July 31, 2006 or prior to sale of the property or transfer of title of the property by the current owner(s) to others.

4. Future or new 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:cd

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xc: Real Property Tax Office-Hilo
DPW-Building (Hilo)-Inspector-Jacobsen
Leilani Community Association (Ltr./Plans)
James E. T. Koshiba, Esq.