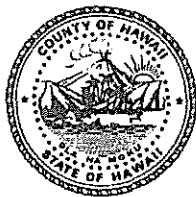


Harry Kim  
Mayor



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

November 3, 2006

Mr. Brian T. Nishimura,  
Planning Consultant  
101 Aupuni Street, Suite 217  
Hilo, HI 96720

Dear Mr. Nishimura:

**VARIANCE-VAR 06-073 (DWELLING-APPROVAL)  
(UNPERMITTED SHED-DENIAL)**

**Applicant: BRIAN T. NISHIMURA,  
PLANNING CONSULTANT**

**Owner(s): ALAN S. KONISHI, ET AL.**

**Request: Variance from Chapter 25, Zoning  
Minimum yards**

**Tax Map Key: 2-4-022:066, Lot 31**

After reviewing your variance application, the Planning Director **approves** Variance-VAR 06-073 to allow a dwelling ("HOUSE") to remain on Lot 31, "AS-BUILT", subject to variance conditions. The Planning Director **denies** your variance request to allow a "SHED" (constructed without a building permit) to remain on Lot 31, "AS-BUILT". The variance application originally requested variances to allow portions of a "HOUSE" with a minimum 9.34 feet side yard and "SHED" with a minimum 1.10 feet side yard and minimum 1.10 feet side yard open space, respectively, to remain on Lot 31, "AS-BUILT", in lieu of minimum 10.00 feet side yard and attendant minimum 5.00 feet side yard open space according to the variance application's site plan map dated June 27, 2006. The variance is from the TMK property's minimum side yard and attendant minimum side yard open space required by the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 1, Section 25-5-7, Minimum yards, (a)(2)(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 TMK property, Lot 31 containing 10,408 square feet of "KOMOHANA GARDENS SUBDIVISION, UNIT I", is situated at Waiakea, South Hilo, Hawaii. The subject property's street address is 1080 Laulima Street.

The property is zoned Single-Family Residential (RS-15) by the County and designated Urban or "U" by the Land Use Commission (LUC).

2. **Variance Application-Site Plan.** The applicant submitted the variance application, attachments, and filing fee on or about September 5, 2006. The variance application's site plan map is drawn to scale and prepared by The Independent Hawaii Surveyors, LLC. The variance site plan map, dated June 27, 2006, denotes portions of the "HOUSE" and "SHED" were constructed within a minimum 10 feet side yard of "LOT 31" or subject TMK property.

The applicant's background report states in part:

"The applicant's recently purchased the property (July, 2006) from Pearl Tanemura. A survey report prepared by The Independent Hawaii Surveyors, LLC, dated July 7, 2006 indicated that, "The shed projects 8.90 feet into the side County Zoning Code 10-foot building setbacks of the north boundary; the house projects 0.66 feet into this setback." The applicants (sic) were made aware of these projections into the side setback area prior to the acquisition of the property and understood that these pre-existing conditions. (See Attached Survey Report and Map)

Building Permit No. 50273 was issued in 1971 for a three bedroom dwelling and carport on the subject property. All inspections for the subject permit were completed on August 29, 1972. The plans reflected a side yard setback of 10 feet for the boundary on the northern property line. The shed which projects 8.90 feet into 10-foot building setback of the north boundary was not included in Building Permit No. 50273 and was apparently constructed without a permit at a later date. The shed appears to have been utilized for storage."

**Note:** The variance site plan map does not identify the location of the cesspool or Independent Wastewater System (IWS). The variance request does not address the location or position of any rock wall, wire fencing, and landscaping, etc. along or straddling common boundary lines.

3. **County Building Records:**

Real Property records indicated Building Permit 50273 was issued on or about "11/09/1971". It appears that the "HOUSE" or dwelling on "LOT 31" identified on the variance site plan map was constructed pursuant to BP 50273 in 1971.

4 **Agency Comments and Requirements-VAR 06-073:**

- a. The State Department of Health (DOH) memorandum is dated September 22, 2006. (Refer to the DOH memorandum in variance file).
- b. The Department of Public Works (DPW) memorandum dated September 28, 2006 states:

"We have reviewed the subject application forwarded by your memo dated September 7, 2006 and note that approval of the application shall be conditioned on the comments as noted below.

A building permit would be required to legalize the shed addition. However, due to its proximity to the property line the exterior wall must be 1 hour fire resistive construction with a parapet and no openings will be permitted in this wall."

- 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 September 7, 2006 and September 29, 2006, respectively, by the applicant. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on September 17, 2006. In addition, pursuant to a notarized affidavit submitted by the applicant, a sign regarding the variance application was posted on the subject property on or about September 15, 2006.

6. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. No written objections from surrounding property owners or the general public were received.

However, the applicant included comment letters from the President of the Komohana Gardens Association, Charles R. Sugiyama and past President, Ed Sorenson with the variance application.

### **SPECIAL AND UNUSUAL CIRCUMSTANCES**

The applicant, on behalf of the owners, submitted the variance application to address or resolve the dwelling and shed encroachments within the property's minimum side yard. The variance application's site plan map was prepared by a surveyor and denotes the location of the "HOUSE", "SHED", and other site improvements, "AS BUILT", on "LOT 31". According to the applicant's project background report, it appears that the owners became aware of the dwelling and shed encroachments with one of the property's minimum side yard "prior to the acquisition of the property and understood that these were pre-existing conditions". No evidence has been found to show indifference or premeditation by previous owners or builders to deliberately create or intentionally allow the dwelling to be built within the affected side yard. However, it appears that the "SHED" building adjoining the dwelling's carport was built after the dwelling was constructed in 1971 without a building permit.

It appears that the existing dwelling or "HOUSE" on "LOT 31" identified on the variance site plan map dated June 27, 2006 was constructed according to a Building Permit No. 50273. It appears that portions of the dwelling or "HOUSE" built circa 1972 within the property's northerly side yard went unnoticed. However, according to the applicant and variance site plan map dated June 27, 2006, it appears that the "SHED" building and shed encroachments into the property's northerly side yard was built on "LOT 31" without a building permit.

### **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 and shed to fit within the correct building envelope prescribed by the Zoning Code.
2. Consolidation of the subject TMK property with the adjoining "common area" lot (TMK: 2-4-022:086) 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.

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It appears that the dwelling encroachments into the property's northerly side yard were completed approximately 35 years ago and are not physically and/or visually obtrusive from the adjacent property or right-of-way (Konomala Drive). It appears that the 35 year old dwelling constructed pursuant to BP 50273 and portions of the dwelling constructed into the side yard do not depreciate or detract from the character of the surrounding neighborhood, public uses, and surrounding land patterns. Therefore, it is felt that that portions of the dwelling built into the property's affected side yard identified on the variance application's site plan map will not detract from the character of the immediate neighborhood or the subdivision. However, the Planning Director does not approve the applicant's request to allow the "SHED" constructed on the property without a building permit to remain, "AS-BUILT", within the property's minimum 10 feet (north) side yard, when there is ample room along the west side yard to build a storage shed or elsewhere on and within the property's building envelope denoted on the variance site plan map dated June 27, 2006 (with a building permit) or seeking a building permit to construct an addition to the dwelling/open carport for storage purposes.

Based on the foregoing findings, the applicant's request for a variance to allow dwelling encroachment into the property's minimum side yard 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 requested for the dwelling's position on Lot 31 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 for the "HOUSE" or dwelling's position, "AS-BUILT" is **approved** subject to the following variance 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 or "HOUSE" located on "LOT 31" will not meet the minimum side yard pursuant to Chapter 25, the Zoning Code, according to the variance application's site plan map dated June 27, 2006. The approval of this variance permits the "HOUSE" improvements to remain, "AS BUILT", on the subject TMK property or "LOT 31" according to the variance site plan map dated June 27, 2006.

The owners shall confer with DPW and secure a building permit for the unpermitted "SHED" identified on the variance site plan map dated June 27, 2006. The "SHED" shall be subject to State law and County ordinances and regulations pertaining to building construction and building location and occupancy.

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, subject to provisions of the Zoning Code or State Law which may change from time to time.
5. Future or new

The Planning Director **denies** a variance application or request to allow a "SHED" (constructed without a building permit) to remain on Lot 31, "AS-BUILT", pursuant to variance site plan map dated June 27, 2006.

Therefore in accordance with a recent charter amendment and Ordinance No. 99-112, you may appeal the director's decision to deny your variance for a proposed addition within the property's side (west) yard 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.

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- (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 owner of the affected property and shall provide the board of appeals with the proof of service.
- (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.

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  
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Enclosure

xc: Real Property Tax Office-(Hilo)