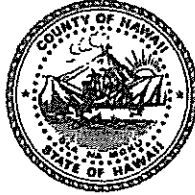


**Harry Kim**  
Mayor



**Christopher J. Yuen**  
Director

**Brad Kurokawa, ASLA**  
**LEED® AP**  
Deputy Director

**County of Hawaii**  
**PLANNING DEPARTMENT**

101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720-4224  
(808) 961-8288 • FAX (808) 961-8742

May 30, 2008

Mr. John K. Lyman  
P. O. Box 402  
Keaau, HI 96749

Dear Mr. Lyman:

**VARIANCE-VAR 07-044**

**Applicant: JOHN K. LYMAN**  
**Owners: JOHN K. LYMAN, ET AL.**  
**Request: Variance from Chapter 25, Zoning**  
**Minimum yards**

**Tax Map Key: 1-6-095:050, Lot 21**

After reviewing your variance application, the Planning Director certifies the approval of Variance-VAR 07-044 subject to variance conditions. The variance allows portions of "Dwelling/Carport" including "Overhang" or associated roof eaves to remain with minimum 10.00 feet to minimum 10.63 feet rear yard and attendant minimum 5.00 feet rear yard open space and portions of "Water Tank" to remain with minimum 8.10 feet rear yard/rear yard open space and minimum 6.13 side yard upon Lot 21, in lieu of the TMK property's minimum 20 feet rear yard, minimum 14 feet rear yard open space, and minimum 10 feet side yard according to the variance application's site plan map. The variance is from the TMK property's minimum rear yard and minimum rear yard open space, and minimum side yard required, pursuant to the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 7, Section 25-5-76, Minimum yards, 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 TMK property, Lot 21 containing 12,000 square feet, Block 55, Ainaloa Subdivision, Land Court Application No. 1053 (Map 70), is situated at Keaau, Puna, Hawaii.

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

2. **Variance Application-Site Plan.** The applicant submitted a revised variance application, attachments, and filing fee on June 19, 2007 and July 24, 2007. The variance application's site plan map is drawn to scale and prepared by Imata and Associates, Inc. The variance site plan map indicate portions of "Existing Dwelling" and attached "Carport" including the "Water Tank" are within the property's minimum 10 feet side yards and 20 feet rear yard of "Lot 21" or subject TMK property.

The applicant's background states in part:

"I John K. Lyman (sic) in 1985 built my house in the Ainaloa Subdivision at 2067 Leialoha Drive, With four kids growing up, starting a new job at the time, money was tight and we needed another room, having a family of four daughters, so at that moment in time my wife Geraldine and I made a decision in 1991 to enlarge the house by adding a bedroom and a garage, not knowing that it was a bad and innocently wrong move on our part as home owners and being that I once work (sic) for most of the local contractors in the Hilo area and knew carpentry, masonry and had the know how to construct it safely for my family, Then one day when I picked up the news paper in September 2006 and read about all the illegal structures and the amnesty program, that is when I said to My wife that we fall in this category and we were wrong and I would like to step forward and come clean on the house, so if any thing should happen to me, which I hope nothing does, That I wouldn't leave her or the kids with a burden that was done by my hammer 17 YEARS ago (sic) Now I realize that permits are only to protect the home owners and to see that codes are followed and for the safety of the public, I made a mistake on the rear boundary set back instead of 20 feet it is now 10 feet, I humbly ask your consideration in granting me a variance zoned change of a set back so I can have this house permitted or what must I/can Possibly do to make it legal."

**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 CRM walls, "Dog Kennel", and other improvements including landscaping, etc. along or straddling common boundary lines.

The applicant-owners recently submitted a letter dated May 8, 2008 and copy of the variance site plan identifying portions of the roof eave or "Overhang" along or straddling the property's (west) side and rear boundary lines will be removed or cut back to minimum 5 feet and the height of accessory building improvements near and along the property's (east) side boundary line are below 6 feet (height).

3. **County Building Records:**

Hawaii County Real Property Tax Office permit records show 1-Building Permit (851125), 1-Electrical Permit (EH66629), and 1-Mechanical (MH40611) or Plumbing Permit were issued to subject TMK property circa 1985. The original dwelling/attached carport including "D.B.W.T" or "Water Tank" upon "Lot 21" was built or completed pursuant to the building and associated construction permits issued in 1985.

4. **Agency Comments and Requirements-VAR 07-044:**

- a. The Department of Public Works (DPW) memorandum dated August 23, 2007 states:

"We have reviewed the subject application forwarded by your memo dated July 25, 2007 and oppose the approval of the application for the reasons noted below.

Our records indicate that only one building permit (851125) was issued for this parcel for a 3-bedroom dwelling (1224 s.f.) with a carport (55 s.f.) (sic). Therefore, it appears that the encroaching portion is illegal.

Please refer questions regarding permits to the Building Division 961-8331."

Note: According to the applicant's site plan, background information, and photographs of the dwelling, subsequent to completing original dwelling and carport in 1985 upon "Lot 21", the owners enclosed and converted the permitted 552 +/- s.f. carport into a family room; and built a bedroom/bath and 2-car carport addition including roof eaves or "Overhangs".

- b. The State Department of Health (DOH) memorandum is dated August 29, 2007. Please refer to State of Hawaii-DOH memorandum in file.
5. **Notice to Surrounding Property Owners.** The applicant submitted copies of correspondence including proof of mailing notices to a list of surrounding property owners to the Planning Department. According to the applicant's submittals received, first notice was mailed on April 16, 2007 and second notice was mailed on August 31, 2007, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on August 3, 2007.

Additional time to mail a revised second notice to surrounding property owners was required by the applicant-owners.

6. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. The following inquiries or comments from surrounding property owners or the general public were submitted by the applicant or received by the Planning Department:
- 6a. Subsequent to April 29, 2007, Nahid Jafari called the Planning Department to discuss the nature of the applicant's variance application and request for variance and confirm location of TMK property (Lot 24) owned by Nahid Jafari, Et al. The property TMK: 1-6-095:054 or Lot 24 owned by Nahid Jafari, Et al. does not abut subject TMK property or "Lot 21" owned by the applicant-owners. The property (Lot 24) owned by Jafari, Et al. has frontage along Leialoha Drive and situated diagonally across "Lot 21" or approximately 40 feet away from a boundary corner of "Lot 21".

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A copy of objection letter signed by Nahid Jafari, Et al., dated April 29, 2007, sent via registered US Mail addressed to the applicant was submitted by the applicant for the variance file.

- 6b. Email sent by Cila A. Goda for Ayako Y. Sonoda, dated September 8, 2007, requesting further information. The Planning Department called Ms. Goda on September 12, 2008 to discuss the applicant's variance application and request for variance; and, confirm the location of TMK: 1-6-095:55 (Lot 22) owned by Ayako Sonoda does not abut Lot 21 and is situated directly across from Lot 21 with frontage along Leialoha Drive.

#### **SPECIAL AND UNUSUAL CIRCUMSTANCES**

The applicant or owners submitted the variance application to address the un-permitted addition constructed without a building permit and position of the water tank and addition/carport within the property's minimum rear and side yard(s) of "Lot 21". The variance application's site plan map denotes the location of the permitted dwelling improvements including the "D.B.W.T." later dwelling improvements and building additions constructed without a building permit. The applicant or owners became aware of the requirement to secure building permit and construction permits **after** the County declared an "Amnesty" policy for un-permitted building improvements. The position of the original D.B.W.T or "Water Tank" upon "Lot 21" including portions of the tank within minimum yard(s) went unnoticed by the agencies in 1985.

The applicant-owners modified and enclosed the original carport and added a bedroom/bath/2-car garage after 1985 without a building permit or construction permits. The owners are requesting variance to remove portions of the roof "Overhang" and allow portions of the addition including the carport and associated roof eaves within the property's minimum rear yard and minimum rear yard open space to remain pursuant to an "Amnesty" policy approved by the County; and intend to secure a building permit for the addition(s) and carport built 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 dwelling addition and open carport constructed without a building permit or secure a building permit for "un-permitted" additions constructed without a building permit subject to County Codes within the property's building envelope prescribed by Zoning. Relocating to water tank to meet minimum yards.
2. Consolidation of the subject TMK property with adjoining lots and resubdivision of the resultant property to modify the subject TMK property's geometry and building envelope to accommodate or permit proposed dwelling and carport addition (position) prior to applying for the "after-the-fact" building permit for the dwelling and carport addition.

## **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 original dwelling and detached water tank constructed with a building permit and 16 + year old addition/carport and roof eaves constructed without a building permit are not physically and/or visually obtrusive from the adjacent property(s) or privately owned right-of-way. According to the site plan and annotations submitted on May 9, 2008, approximately 7' to 8' +/- feet of unpermitted "Overhang" or roof eave straddling subject TMK property's side and rear boundary lines will be removed; and, a building permit and construction permits for unpermitted modification to original dwelling and dwelling addition and carport addition including remaining "Overhang" will be secured from the DPW. The adjoining property-TMK: 1-6-095:029 or "Lot 22" denoted on the variance site plan map is owned by the applicant-owners. Therefore, given the circumstances and unusual nature of the variance request, it is felt that portions of the dwelling/carport built into the property's rear yard and portions of the water tank within the property's minimum rear and side yard will not detract from the character of the immediate neighborhood or the subdivision.

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The variance application was acknowledged by letter dated July 25, 2007 and additional time to allow the applicant's to notify surrounding property owners and submit additional information was required. The applicant agreed to an extension of time to incorporate additional background information and granted the Planning Director an extension of time to render a decision on the subject variance to May 30, 2008.

Based on the foregoing findings, there are unusual circumstances regarding the nature of the variance request and variance application. In this instance, the request for variance 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.

#### **PLANNING DIRECTOR'S DECISION AND VARIANCE CONDITIONS**

This variance application 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 "Existing Dwelling" and attached "Carport" and "Water Tank" located upon "LOT 21" will not meet the minimum (front/rear/side) yard (open space) pursuant to Chapter 25, the Zoning Code, according to the variance application's site plan map submitted with the variance application. The approval of this variance permits removal of "Overhang" and allows portions of dwelling/carport/water tank and remaining roof eave built into the affected minimum side yard and minimum rear yard and attendant minimum open yard spaces of "Lot 21" or subject TMK property to remain in accordance with variance and site plan map and annotations submitted by the applicant-owners on or about May 9, 2008.

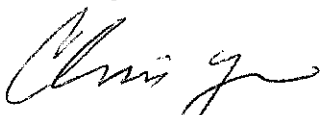
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The applicant or current owners shall secure a building permit and any other necessary construction permits required by the DPW for the unpermitted dwelling and carport addition on or before December 31, 2008. The building permit and/or construction permits shall be closed or "finalized" by the DPW-Building Division prior to sale of the property or transfer of title of the property by the current owner(s) to others.

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 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 subject Variance null and void.

Sincerely,



CHRISTOPHER J. YUEN  
Planning Director

WRY:cs  
P:\WP60\WRY\FORMLETT\VAR07-044ZCSETBACK.LYMAN

xc: Real Property Tax Office-(Hilo)  
Nahid Jafari, Et al.  
Mrs. Ayako Sonoda