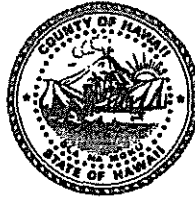


Harry Kim
Mayor



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

February 1, 2008

Mr. Eric and Mrs. Elizabeth Maria Clause
13-979 Kahukai Street
Pahoa, HI 96778

Dear Mr. and Mrs. Clause:

SUBJECT: VARIANCE-VAR 07-083
Applicants: ERIC CLAUSE, ET AL.
Owners: ERIC CLAUSE, ET AL.
Request: Variance from Chapter 25, Zoning,
Minimum Yards
Tax Map Key: 1-3-030:025, Lot 40

After reviewing your variance application, the Planning Director certifies approval of Variance-VAR 07-083 to allow portions of a dwelling ("HOUSE") including attached garage/projections and detached "WATER TANK" being built on Lot 40 to remain upon Lot 40 according to survey map dated October 25, 2007. The variance allows portions of the dwelling/attached garage with minimum 15.00 feet to minimum 15.82 feet (northerly) side yard and attendant minimum 12.82 feet to minimum 12.96 feet (northerly) side yard open space and minimum 15.27 feet to minimum 16.01 feet (southerly) side yard and attendant minimum 12.23 feet to minimum 13.02 feet (southerly) side yard open space; and, allow portions of detached "WATER TANK" with minimum 14.63 feet (northerly) side yard and minimum 26.04 feet rear yard to remain within respective minimum 20.00 feet side yard(s) and minimum 30.00 feet rear yard according to the variance application's site plan map dated October 25, 2007. The variance is from the subject TMK property's minimum side yard(s) and attendant minimum side yard open space requirements, and minimum rear yard 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 referenced TMK property, Lot 40 containing 1.000 acre, is within Block 35, Leilani Estates, and situated at Keahialaka, Puna, Hawaii.

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

2. **Planning Department Letter-Dated: October 24, 2007-(File No. 07-140E).** The owners are currently constructing a dwelling and detached water tank upon subject TMK property pursuant to Building Permit B2007-2104H. Subsequent to completing the framing of the dwelling, a complaint was filed with the Planning Department alleging the dwelling under construction encroaches into subject TMK property's minimum (side) yards required by Chapter 25, the Zoning Code.

The Planning Department letter dated October 24, 2007, page 2 and page 3 attached to the variance application states in part:

Page 2:

- "6. The complaint brought to our attention that Building Permit B2007-2104H was issued improperly. Although the Planning Department identified the side yard (setbacks) on the "Site Plan" on Page T-1 of the permitted building plans as "20-feet," (sic) the plans showed a distance of "16-feet" from the proposed new dwelling "side walls" to both "side" property lines. Further, the "Master bathroom" wall along the northeastern side of the structure has a "1-0" cantilever. This portion of the finished wall will be approximately fifteen (15) feet from the northern property line.

Our Zoning Clerk indicated that he was aware of this encroachment, but thought that by identifying the correct "side yard (setback)," (sic) this would override the written dimensions. He did not realize that the size of the drawn dwelling structure was too large for the allowable buildable area, the building permit plans should have been rejected and returned to be redrawn.

Based on the above and pursuant to Section 25-2-35(c) of the Hawaii County Code, we request that the following items be performed and completed as soon as possible to resolve this situation."

Page 3:

“Corrective action consists of:

- 1) Secure a licensed surveyor, licensed by the State of Hawaii, to conduct a survey showing the placement of the new dwelling structure (under construction) and all its projections, including roof eaves, on the subject property; and
 - 2) Once the survey is completed, submit to this office the detailed survey map, prepared, stamped, and signed by the licensed surveyor, describing the location of the placement of the new dwelling (under construction) and all its projections, including roof eaves, in relation to the required setbacks.
 - 3) Apply for a Zoning Variance (application enclosed) for the “side” yard (setback) encroachments to the northern and southern property lines. **We will waive the \$250.00 filing fee. (sic)** (Please attach a copy of this letter to the variance application upon submission to this office).”
3. **Variance Application-Site Plan**. The applicants or owners submitted the variance application from the Chapter 25, Zoning Code, attachments, copies of a survey map dated October 25, 2007, and copy of PD letter dated October 24, 2007. (Note: The variance filing fee was waived pursuant to Planning Department letter dated October 24, 2007):

The applicant’s variance application (REQUEST) states in part:

“SIDE & REAR YARD VARIANCE 14.96 N & 15.27 S SIDE YARD SETBACKS TO ACCOMMODATE HOURS” (sic)

Note: The variance site plan map dated October 24, 2007 does not identify the location of the cesspool or Independent Wastewater System (IWS). The variance request does not address the location or position of walls and landscaping, etc. along or straddling common boundary lines.

3. **Agency Comments and Requirements-VAR 07-083:**

- a. The State Department of Health (DOH) memorandum dated December 26, 2007 states:

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

- b. The Department of Public Works (DPW) memorandum or comments dated January 9, 2008 states in part:

“NO COMMENTS”

4. **County Building Records:**

Hawaii County Real Property Tax Office permit records show 1-Building Permit B2007-2104H) and 1-Mechanical (M2008-0038H) or Plumbing Permit were recently issued to subject TMK property.

5. **Notice to Surrounding Property Owners.** Proof of mailing notices to surrounding property owners was submitted to the Planning Department. According to the submittals or mailing receipts, it appears that notices were mailed to surrounding property owners on December 24, 2007 and December 28, 2007, respectfully. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on December 26, 2007.

6. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. The following letter from surrounding property owner was considered and incorporated into the variance file:

- 5a. Objection letter from Mitch Thompson (TMK: 1-3-030:023) dated January 8, 2008 (postmarked January 9, 2008) received on January 10, 2008 by the Planning Department.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicants or owners became aware of encroachment issues within the subject TMK property's minimum yards after the owners received a Planning Department letter dated October 24, 2007. Pursuant to letter dated October 24, 2007 the applicant filed the variance application and variance site plan map prepared by a surveyor dated October 25, 2007 denoting the location of the dwelling-projections and detached water tank being constructed upon subject TMK property to address the Zoning Code violations and building encroachments into the property's minimum yards.

According to copy of October 24, 2007 letter included with the variance application, it appears that the dwelling's size and position upon the property including the dwelling encroachments into the property's minimum side yards and detached water tank encroachments into the property's minimum yards and attendant minimum open yard spaces required by the Zoning Code were caused by County staff to approve the detailed house plans and site plan submitted with the building permit application assigned Building Permit B2007-2104H.

The dwelling and detached water tank's location or position upon the subject TMK property are currently being constructed upon the subject TMK property by the applicants or owners pursuant to detailed house plans and site plan submitted with building permit application for approval by the agencies and DPW-Building Division. The size and position of the dwelling/ garage/roof eaves or projections and detached water tank being constructed upon subject TMK property essentially comport to detailed building plans including scale drawn site plan attached to the building permit application approved by the Planning Department, other agencies, and DPW-Building Division; or detailed house plans and site plan assigned Building Permit B2007-2104H including survey map dated October 25, 2007 filed with the variance application. However, Building Permit B2007-2104H did not permit construction of a "TEMPORARY CONSTRUCTION SHED" identified on the variance site plan map dated October 25, 2007.

ALTERNATIVES

Alternatives available to the applicant to correct and/or address the building encroachments constructed into the affected yards of the subject TMK property include the following actions:

1. Remove the building dwelling and water tank encroachments within the property's affected yards or redesigning or relocating the dwelling/projections and detached water tank to fit within the building envelope identified prescribed by the Zoning Code and variance site plan map.

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2. Consolidation of subject TMK property (Lot 40) with adjoining TMK or following TMK properties: TMK: 1-3-030:024 (Lot 41); 026 (Lot 39), or 038 (Lot 27) and resubdivision to modify property lines or adjust minimum (side(s) and/or rear) yards, etc.

INTENT AND PURPOSE

The intent and purpose of requiring minimum yards or 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.

Given the above circumstances and alternatives, it is possible that the variance request and variance application could have been avoided by requiring the applicants or owners to modify the plans, e.g., reducing the floor area or size of the proposed dwelling including relocating the detached water tank to fit within the property's building envelope before issuance of the building permit, modifying the property size, etc. However, Leilani Estates Subdivision was approved by the County before the original Zoning Code was adopted by the County in 1967. The subject TMK property or Lot 40's geometry and adjoining or similar sized lots within Leilani Estates Subdivision were approved prior to 1967 having a 100.00 feet minimum building site average width. This lot (Lot 40) and adjoining or similar sized lots having similar lot geometry within Leilani Estate Subdivision became non-conforming after the County adopted the Zoning Code in 1967; since, Lot 40's 100.00 feet minimum building site average width is less than the minimum 120.00 feet minimum building site average width required for subdivisions zoned Agricultural (A-1a) pursuant to the 1967 Zoning Code. In view of the foregoing and after considering the circumstances to approve the Building Permit, in this instance, it is felt that portions of the dwelling including projections and detached water tank within the property's side yards and rear yard will not significantly detract from the character of the surrounding land patterns and immediate neighborhood.

Based on the foregoing findings and given the circumstances regarding the approval of the building plans and issuance of the building permit including the property's lot geometry, the variance request and application submitted by the applicants or owners 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 application is hereby **approved** subject to 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/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 existing (single-story residence) and detached water tank will not meet the subject TMK property's minimum side yard and attendant minimum side yard open space requirements and minimum rear yard required by the Chapter 25, the Zoning Code. The approval of this variance permits the dwelling/garage/projections and detached water tank to remain on the subject TMK property according to the variance site plan map dated October 25, 2007 in subject variance file-VAR 07-083.
4. The applicant or current owners shall address the status of Building Permit-B2007-2104H issued to subject TMK property by the DPW-Building Division (Hilo). This active or "open" building permit including associated and plumbing permit issued to subject TMK property shall be completed or "finaled" by the DPW-Building Division prior to sale of the property or transfer of title of the property by the current owner to others.
5. The "TEMPORARY CONSTRUCTION SHED" identified on the variance site plan map dated October 25, 2007 and constructed without a County building permit shall be removed prior to completion of the dwelling and detached water tank by the DPW-Building Division or occupancy of the dwelling by the applicants or owners.
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:cs

PAWP60\WRY\FORMLET\VAR07-083ACSETBACKAPP.CLAUSE

cc: Real Property Tax Office-Hilo
Leilani Estates
Mr. Mitch Thompson