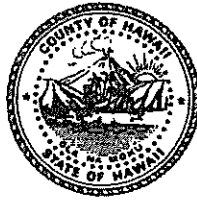


Harry Kim
Mayor



Christopher J. Yuen
Director

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County of Hawaii
PLANNING DEPARTMENT

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

June 24, 2008

Mr. Michael D. Tuttle
P. O. Box 758
Volcano, HI 96785

Dear Mr. Tuttle:

SUBJECT: VARIANCE-VAR 08-026
Applicant: MICHAEL D. TUTTLE
Owner: HALE OHIA LLC
Request: Variance from Chapter 25, Zoning
Minimum yards
Tax Map Key: 1-1-005:019 and 042, (SUB 08-000731)

After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request subject to variance conditions. The applicant/owner submitted proposed subdivision application (SUB 08-000731) proposing to consolidate and re-subdivide referenced TMK property(s) creating Lot 14-A (14,961 square feet) and Lot 14-B (20,802 square feet and Roadway Lot (5,099 square feet). Variance-VAR 08-026 permits subdivision and allows portions of "SMALL COTTAGE w/WATER TANK BELOW" to remain upon proposed "LOT 14-A" with minimum 15.34 +/- feet front yard and minimum 8.81 feet to minimum 9.11 feet side yard in lieu of proposed Lot 14-A's required minimum 20.00 feet front yard and minimum 10.00 feet side yard; and variance to allow "WATER TANK" or water tank(s) to be relocated/built upon Lot 15-A with minimum 4.00 feet side yard to minimum 10.00 feet side yard in lieu of proposed Lot 15-A's required minimum 15.00 feet side yard(s) and attendant minimum 10.00 feet side yard open space requirements according to survey map dated February 25, 2008 or revised survey map dated April 28, 2008. The applicant or subdivider is requesting variance from minimum yards required and attendant minimum yard open space requirements pursuant to the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 1, Section 25-5-7, Minimum yards, (2)(A)(B), (3)(B), Section 25-5-8, Other

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regulations, and Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open space requirements, (a) to permit proposed consolidation/resubdivision of the subject TMK property(s).

BACKGROUND AND FINDINGS

1. **Location.** The referenced TMK property(s) containing an aggregate area of approximately 40, 862 square feet, Hale Ohia Tract, portion of R.P. 7223, L. C. Award 8559-B, Apana 16 to W. C. Lunalilo, are situated at Keaau, Puna, Hawaii.

The property is zoned Single-Family Residential (RS-20) by the County and designated Urban or "U" by the Land Use Commission (LUC).

2. **Use Permit No. 165:** The applicant was granted Use Permit No. 165 by the Planning Commission subject to listed conditions in letter dated November 27, 1997. The applicant was permitted to operate a five (5) bedroom bed and breakfast operation (Hale Ohia Cottages) within dwelling and guest house situated upon subject TMK property(s) containing an aggregate area of approximately 34,163 square feet. Subsequent to the applicant's inquiry letter dated November 15, 2006 and Planning Department (PD) letter dated November 29, 2006, a Notice of Violation and Order (ZCV 07-071E) dated June 5, 2007 was sent by certified mail to the applicant/owner.

The PD violation letter dated June 5, 2007 cites corrective action on page 7 and page 8. Corrective action "4)" states:

"Submit and receive approval for all applicable governmental permits including, but not limited to, the Department of Public Works-Building Division, the Planning Department, and the Department of Health for any unpermitted structures and alterations, such as the conversion of the 1930's water tank to a habitable unit and the addition to the caretakers cottage."

3. **Subdivision Application.** The applicant submitted subdivision consolidation resubdivision application (SUB 08-000731) and preliminary plat map (PPM) dated February 25, 2008 proposing to subdivide subject TMK property(s) into "LOT 14-A", LOT 15-A" and "ROADWAY LOT".

The Planning Department letter dated April 21, 2008 deferring further action on subdivision application (SUB 08-000731) states in part:

"This application is being processed under Section 23-7 of the Subdivision Code whereby the requirements and standards of the Subdivision Code shall not apply to consolidation and resubdivision action resulting in the creation of the same of the same or fewer numbers of lots than which existed prior to the consolidation/resubdivision action.

We note that the subdivider intends to request a variance from the zoning code structural setback requirements (application enclosed). Although we will distribute this application for their review and comments, further action will be deferred until such time as the results of a variance application are known. Please be aware that the mere submittal of the variance application does not imply its tacit approval."

4. **Variance Application-Site Plan.** The applicant submitted variance application and filing fee on February 25, 2008 and other submittals on April 28, 2008. The application includes a full-sized site plan/survey map dated April 25, 2008 and revised (reduced) survey map dated April 28, 2008 prepared for the applicant by The Independent Hawaii Surveyors, LLC.

The survey map, dated February 25, 2008, drawn to scale, and revised (reduced) survey map dated April 28, 2008, denotes portions of "SMALL COTTAGE W/WATER TANK BELOW" is located within the front yard and side yard of proposed lot "LOT 14-A" and a portion of a "WATER TANK" will relocated and include a second "WATER TANK" within a side yard of proposed lot "LOT 15-A".

The applicant's background information dated April 25, 2008 states in part:

"The existing water catchment tank on proposed lot 15-A, currently encroaches about 42 inches onto the adjoining property owner, Shipman Ltd. I would like to resolve this encroachment by relocating the tank completely on proposed lot 15-A. Because of the steep terrain on the north side of the proposed tank location, I am requesting a variance on the setback to approximately 4-5 feet from the southeast property line and to

approximately 8 feet on the northeast side. I would also like to request approval for second emergency tank to be located adjacent (southwest) of the relocated tank.”

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 building(s) legally built upon the subject TMK property(s) prior to 1967 including fencing and landscaping, etc. along or straddling common boundary lines.

In addition, The Independent Hawaii Surveyors, LLC, indicated the minimum distance or front yard between a corner of proposed roadway lot and wall of the “SMALL COTTAGE W/WATER TANK BELOW” upon proposed “LOT 14-A” is 15.34 feet (front yard).

5. **County Building Records:**

Hawaii County Real Property Tax Office records for the subject TMK property(s) show a single-family dwelling was built in 1931. Recent building permit records indicate 5-Building Permits (28729, 28763, 39918, 802053, 922297), Electrical Permits (EH56425, E930387) and Mechanical (MH33149, M922026) or Plumbing Permit were issued. The dwelling upon proposed “LOT 15-A” was built circa 1931; and, subsequent building permits and associated construction permits were issued to the TMK property(s) between 1964 and 1992.

6. **Agency Comments and Requirements-VAR 08-026:**

- a. The State of Hawaii-Department of Health (DOH) memorandum is dated May 13, 2008. Refer to the DOH memorandum in variance file.
- b. The Department of Public Works (DPW) memorandum dated May 20, 2008 states in part:

“We have reviewed the subject application forwarded by your memo dated May 2, 2008 and recommend approval of the application be conditioned as noted below.

The "small cottage" on the property line and the carport straddling the property line will be considered "existing nonconforming." We have no objection to this variance with the stipulation that building, plumbing, and electrical applications for the "small cottage w/ water tank below" be submitted within three (3) months after the variance is approved."

7. **Notice to Surrounding Property Owners.** The applicant submitted copy of notices sent to surrounding property owners and other submittals including certificates of mailing to the Planning Department. According to these submittals the first notice was mailed on May 1, 2008 and second notice was mailed on May 12, 2008, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on May 9, 2008.
8. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. No written comments or objections from surrounding property owners or the general public were received.

SPECIAL AND UNUSUAL CIRCUMSTANCES

Subsequent to receipt of the Notice of Violation and Order (ZCV 07-071E) letter and corrective action dated June 5, 2007, the applicant filed a subdivision application on March 5, 2008. The PD letter, dated April 21, 2008, acknowledging subdivision application (SUB 08-000731) and PPM to consolidate subject TMK property(s) including road lot and resubdivide resultant consolidated property into "LOT 14-A" (14,931 square feet), "LOT 15-A" (20,802 square feet), "ROADWAY LOT" (5,099 square feet), in the subdivision application file states in part:

"The application is being processed under Section 23-7 of the Subdivision Code whereby the requirements and standards of the Subdivision Code shall not apply to consolidation and resubdivision action resulting in the creation of the same or fewer numbers of lots than that which existed prior to the consolidation/resubdivision action.

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We note that the subdivider intends to request a variance from the zoning code structural setback requirements (application enclosed). Although we will distribute this application to the concerned agencies for their review and comments, further action will be deferred until such time as the results of a variance application are known. Please be aware that the mere submittal of the variance application does not imply its tacit approval."

Subsequent to filing above referenced subdivision application and receiving acknowledgment letter dated April 21, 2008, the applicant filed a variance application on May 2, 2008 to address and resolve building encroachment issues revealed by the subdivision application's PPM, acknowledgement letter dated April 21, 2008, and corrective actions cited in the June 5, 2007 violation letter. The subdivision PPM and variance application's site plan were prepared by a surveyor denoting the position of existing cottage with water tank below and proposed water tanks positions upon the subject TMK property(s) or proposed subdivision. The applicant or subdivider became aware of the precise building positions and extent of building encroachments into minimum yards after a modern survey of the property or PPM was completed. No evidence was found to show indifference by previous owner(s)/builder(s) or current applicant/owner to deliberately create or intentionally construct or allow building encroachments revealed by recent survey maps or proposed subdivision's PPM. No oral or written objections from surrounding property owners or general public to the applicant's request for variance or variance application were received by the Planning Department.

Portions of a water tank including other non-conforming buildings constructed many years ago straddle boundary line and older wooden water tank upon the subject TMK property(s) were constructed many years ago prior to the adoption of the Zoning Code in 1967. Portions of non-conforming building or water tank improvements constructed many years ago or prior to 1967 upon abutting or adjoining property have been removed and/or relocated upon property owned by the applicant.

ALTERNATIVES

Alternatives available to the applicant to correct and/or address the building encroachments (e.g. cottage with water tank below and 2-water tanks) within the affected yards of the subject TMK property and/or proposed subdivision include:

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1. Modify or removing building encroachments or redesigning or relocating cottage ("Cottage 44") and both water tanks to fit within the correct building envelope(s) for existing or proposed subdivided lots prescribed by the Zoning Code.
2. Consolidation of subject TMK property(s) with abutting or adjoining property(s) and resubdivision to modify property lines/adjust minimum yards, etc.

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.

According to PD files, an older non-conforming wooden water tank was modified into a cottage without a building permit and portion of a water tank straddles a property line and encroaches into an adjoining property. The position of the original wooden water tank below the cottage and water tank straddling a boundary line are not physically and/or visually obtrusive or visible from the public right-of-ways (e.g. Old Volcano Road or Hawaii Belt Road). It is felt that the recent modification or conversion of the old water tank into cottage with water tank below and proposed water tank positions denoted on the subdivision application's PPM do not depreciate or detract from the character of the surrounding neighborhood and surrounding land patterns. Therefore, after considering the property's lot geometry, character of the surrounding area, and previous uses upon the property, is felt that the restoration and modification to the original wooden tank into a cottage (with water tank below) and both water tanks identified on the variance application's site plan map or denoted on the subdivision application's PPM will not detract from the character of the immediate neighborhood or proposed subdivision; and may be allowed to remain or built pursuant to variance and variance conditions.

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 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 "SMALL COTTAGE W/WATER TANK BELOW" upon proposed "LOT 14-A" will not meet minimum front and side yards including attendant minimum open yard space requirements and existing and proposed "WATER TANK" upon proposed "LOT 15-A" will not meet the minimum side yards and minimum side yard open space requirements pursuant to Hawaii County Code, Chapter 25, Zoning. The approval of this variance permits "SMALL COTTAGE W/WATER TANK BELOW" to remain upon proposed "LOT 14-A" and allows both water tanks to be built upon "LOT 15-A" according to site plan map or survey map dated April 28, 2008 and/or approved final plat map in subdivision application file (SUB 08-000731).

The applicant or current owner shall submit necessary detailed building construction plans and secure building permits from the DPW-Building Division in Hilo for cottage with water tank below (Cottage #44) upon proposed "LOT 14-A" and both water tank upon proposed "LOT 15-A" within one (1) year from the date of issuance of final subdivision approval to SUB 08-000731. The building permits together with any required construction permits issued to "LOT 14-A" and "LOT 15-A" shall be closed or "completed" by the DPW-Building Division prior to submitting any application to amend USE PERMIT 165 or applying for any applications to permit bed and breakfast operations upon any lots created by SUB 08-000731.

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In addition, detailed building construction plans for the "cottage" and/or any modifications to buildings associated with buildings previously designated historical building(s) upon the subject TMK property(s) or upon lots created by proposed subdivision are subject to State of Hawaii-Department of Land and Natural Resources (DLNR) guidelines and requirements; and, if necessary, DLNR review and approval.

4. The applicant/owner shall be responsible for contacting Zoning Inspector Robert Usagawa by telephone and in writing to address status of Notice of Violation and Order (ZCV 07-071E) including completion of corrective action stipulated in letter dated June 5, 2007.
5. 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(s) or lots created by SUB 08-000731, subject to provisions of the Zoning Code or State Law which may change from time to time.
6. Future or new building improvements and permitted uses upon lots created by SUB 08-000731 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/DSA:cs

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xc: Real Property Tax Office (Hilo)
SUB 08-000731
PD-Zoning Inspector-Hilo
DPW-Building Division (Hilo)