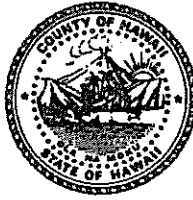


**Harry Kim**  
Mayor



**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

July 8, 2008

Mr. Richard A. Ainsworth  
and Ms. Margaret E. Rowan  
68-1715 Halona Place  
Waikoloa, HI 96738

Dear Mr. Ainsworth and Ms. Rowan:

**VARIANCE-VAR 08-033**

**Applicant: RICHARD A. AINSWORTH, ET AL.**

**Owners: RICHARD A. AINSWORTH, ET AL.**

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

**Tax Map Key: 6-8-028:026, Lot 26**

After reviewing your variance application, the Planning Director certifies the approval of Variance-VAR 08-033 subject to variance conditions. The variance allows portions of a single-family dwelling or corner of "Single Story House" and associated roof "Eave" to remain upon Lot 26 with minimum 7.4 feet side yard and attendant minimum 4.5 feet side yard open space in lieu of required minimum 10.00 feet side yard and attendant minimum 5.00 feet side yard open space according to the variance application's survey map signed and dated January 12, 2001. The variance is from the TMK property's minimum side yard and attendant minimum side yard open space requirements pursuant to the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 1, Section 25-5-7, Minimum yards, (2)(B), and Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open space requirements, (a).

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## **BACKGROUND AND FINDINGS**

1. **Location.** The referenced TMK property, Lot 26 containing 13,042 square feet, of "SUNSET RIDGE AT WAIKOLOA", Phase 2, Increment 1, File Plan 2043 is situated at Waikoloa, South Kohala, Hawaii. The referenced TMK property's street address is 68-1715 Halona Place.

The property is zoned Single-Family Residential (RS-10) by the County and designated Urban or "U" by the Land Use Commission (LUC).

2. **Variance Application-Site Plan.** The applicant-owners submitted variance application, attachments, and filing fee on May 22, 2008. The variance application includes a site plan or survey map is drawn to scale prepared by Don McIntosh Consulting. The survey map, dated January 5, 2001, denotes portions or corner of "Single Story House" is built into and upon a minimum 10 feet side yard of "LOT 26" or subject TMK property.

The applicant's attached the following narrative and information to the variance application:

"The footprint and roofline of the existing dwelling are as built by the developer in 1991 which resulted in an intrusion into the side yard setback as noted above. See attached site plan and survey letter from a survey of the property in January 2001, plus a photograph of the house and fence that show the intrusion. Please note that the fence is situated 1.9 ft. into the owner's lot, giving the impression in the photograph that the house is closer to the boundary than it actually is.

After purchasing the home in 2003, the current owners rented out the house to various tenants until October 15, 2007. At that time, the current owners retired from employment on the mainland and are now occupying the home as their primary residence. The current owners want to comply with county codes and have been informed that they are required to obtain a variance for the set back intrusion. They would also like to make some internal modifications to the home in the future, for which appropriate building permits will be requested, and provide potential future purchasers with a property that complies with county codes."

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**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 wall, fence post, fencing, and landscaping, etc. near or straddling subject TMK property's boundary lines or upon common boundary lines shared with abutting lot(s) or property.

3. **County Building Records:**

Hawaii County Real Property Tax Office permit records show Building Permit (902754) was issued to subject TMK property on November 16, 1990. A copy of B No. 902754 indicates the building permit was assigned to the following TMK parcel or Z "6" S "8" PL "2" PAR "36" in 1991. It appears that the dwelling upon "LOT 26" was issued B No. 902754 on November 16, 1990 by the DPW-Building Division (Hilo).

4 **Agency Comments and Requirements-VAR 08-033:**

- a. The State Department of Health (DOH) memorandum dated June 5, 2008

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

- b. The Department of Public Works (DPW) memorandum dated June 6, 2008 states in part:

"Buildings shall conform to all requirements of code and statutes pertaining to building construction, (see attached memorandum from our Building Division).

A building permit will be required for the change in use. Different code sections and standards on building construction may apply."

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The attached DPW-Building Division memorandum dated June 3, 2008 states in part:

“We oppose the approval of the application for the reasons noted below.

Others: Dept. of Public Works does not have any record of an (sic) dwelling on this parcel.”

**Note:** Refer to County Building Records or Hawaii County Real Property Building Records findings cited above and variance conditions.

5. **Notice to Surrounding Property Owners.** The applicant submitted a transmittal letter dated June 16, 2008 and attached “documentation” regarding notices sent to surrounding property owners to the Planning Department. According to the applicant’s transmittal letter and attached submittals, it appears that first notice was sent or mailed to surrounding property owners on May 27, 2008 and June 2, 2008; and, second notice was mailed to surrounding property owners on June 10, 2008. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on June 5, 2008.
6. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. The applicant’s transmittal letter dated June 16, 2008 and submittals received by the Planning Department on June 19, 2008. No other written comments or objections from surrounding property owners or general public were received by the Planning Department.

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### **SPECIAL AND UNUSUAL CIRCUMSTANCES**

The applicant or current owners submitted the variance application to address or resolve the dwelling encroachments within the property's minimum side yard. The variance application's site plan map, prepared by a surveyor, denotes the location of the single story dwelling and other site improvements upon "LOT 26". It appears that the current owners became aware of building encroachment within the property's side yard during escrow. No evidence has been found to show indifference or premeditation by previous owners or builders to deliberately create or intentionally allow the corner of the dwelling and attendant eave to be built into the property's minimum (northerly) side yard.

According the Real Property Building Records, the dwelling upon the subject TMK property or "LOT 26" was constructed pursuant to building permit-902754 issued on November 16, 1990 and the DPW-Building Division (Hilo) records show the dwelling was completed on July 30, 1991. It appears that during construction of the dwelling between 1990 and 1991, a portion or corner of the dwelling within a minimum side yard of "LOT 26" went unnoticed by the builders and agencies.

### **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.
2. Consolidation of Lot 26 with adjoining property (TMK: 6-8-028:025, Lot 25) and resubdivision to modify property lines or 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.

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Portions of the single story dwelling and attendant roof eave constructed approximately 17 years ago into the property's minimum side yard are not physically and/or visually obtrusive from the adjacent property (Lot 25) or right-of-way. It appears that a corner of the dwelling or 17 + year old building encroachment within the property's minimum 10 feet side yard does not depreciate or detract from the character of the surrounding neighborhood and surrounding land patterns. Therefore, it is felt that the corner of the dwelling within a minimum 10 feet side yard and attendant minimum side yard open space can remain and will not detract from the character of the immediate neighborhood or the subdivision.

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 a single story dwelling including roof eave built upon subject TMK property or "LOT 26" will not meet the minimum side yard pursuant to Chapter 25, the Zoning Code, according to the variance application's site plan or survey map signed and dated January 12, 2001. The approval of this variance permits "Single Story House" including attendant roof "Eave" to remain upon subject TMK property or "LOT 26" according to variance and survey map dated January 12, 2001.

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The applicant or current owners shall contact the DPW-Building Division (Hilo) to discuss; and, if necessary correct the TMK parcel number listed on Building Permit-BP No.902754 issued by the County-DPW on November 16, 1990 prior to applying for any future building construction permits to modify the dwelling upon subject TMK property or "LOT 26" or prior to any transfer of title or sale of the property 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 this Variance Permit null and void.

Sincerely,



CHRISTOPHER J. YUEN  
Planning Director

WRY:cs

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xc: Real Property Tax Office-Kona