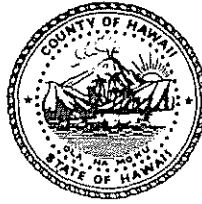


William P. Kenoi
Mayor



BJ Leithead Todd
Planning Director

County of Hawaii

PLANNING DEPARTMENT

Aupuni Center • 101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720
Phone (808) 961-8288 • Fax (808) 961-8742

March 20, 2009

Ms. Val Colter
12-7242 Kii Nani Street
Pahoa, HI 96778

Dear Ms. Colter:

SUBJECT: VARIANCE-VAR 08-069
Representative: VAL COLTER
Owners: SCOTT ROBERTS, ETAL.
Request: Variance from Chapter 25, Zoning
Minimum yards
Tax Map Key: 1-2-031:089

After reviewing your variance application, the Planning Director certifies the approval of Variance-VAR 08-069 subject to variance conditions. The variance permits portions of 1-story dwelling being constructed upon Lot 74 to remain with a minimum 7.20 feet to minimum 13.60 feet front yard and attendant minimum 7.7 +/- feet front yard open space along Mauka Nui Street in lieu of minimum 15.00 feet front yard and attendant minimum 10.00 feet front yard open space requirements pursuant to site plan map dated October 9, 2008. The variance is from the TMK property's minimum front yard and required minimum front yard open yard space pursuant to the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), 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 74 containing 8340 square feet, Lot 74 of Kahena Beach Estates, F. P. 908, is situated at Keauohana, Puna, Hawaii. The referenced TMK property's address is 12-452 Ole Ole Street (corner of Ole Ole Street and Mauka Nui Street).

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

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2. **Variance Application-Site Plan**. The owner's representative submitted the variance application, attachments, and filing fee on November 24, 2008 and other submittals related to the variance request and variance application. The variance application's site plan map is drawn to scale and prepared by The Independent Hawaii Surveyors, LLC. The variance site plan or survey map, dated October 9, 2008, denotes the position of "SINGLE STORY RESIDENCE" upon "LOT 74" and portion of the dwelling constructed into minimum 15 feet wide front yard along Mauka Nui Street of subject TMK property.

The representative's background information (page 1) states in part:

"The following special circumstances apply to the subject real property. The previous owner, Joshua Anderson acting as owner-builder made an error in his placement of a permitted residence. This resulted in the house being built as much as 4.8 ft (sic) into a 15 ft. front setback. Both a kitchen wall and a garage wall are in the setback. The roof overhang is an additional 3 ft. Mr. Anderson sold the house to the current owners, Mr. Roberts and Ms. De Vault were unaware of the encroachment until they met at the house with a septic installer and a draftsman. At that time the probability of a setback violation was brought to their attention. A survey was ordered and performed. The survey made clear to the new owners that there was indeed an encroachment into the setback."

Note: The variance site plan map does not identify the location of dwelling's cesspool or Independent Wastewater System (IWS) and position of permitted water tank. The variance request does not address the location or position of fencing and landscaping, etc. along or straddling common boundary lines.

3. **County Building Records:**

Hawaii County Real Property Tax Office records show 1-Building Permit (B2005-0523H) and Mechanical (M2005-1500H) or Plumbing Permit are issued to subject TMK property and are currently "open". Further, the Building Permit (B2005-0523H) originally issued to the previous owner (Anderson) was transferred to the current owners-Scott Roberts, Et al. on or about September 2, 2008.

4. **Variance Application (VAR 08-069)-Agency Comments and Requirements:**

- a. The State Department of Health (DOH) memorandum dated February 11, 2009 states:

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

- b. The Department of Public Works (DPW) memorandum dated February 24, 2009 states:
"We have reviewed the subject application forwarded by your memo dated February 4, 2009 and require approval of the application be conditioned as noted below.

A building permit will be required to convert the garage to a living room and enclose a portion of the lanai to be a part of the kitchen."

- 5. **Notice to Surrounding Property Owners.** A copy of first notice and second notice sent by USPO to surrounding property owners and mailing certificates were submitted to the Planning Department. According to these submittals the first and second notices were mailed by USPO on November 25, 2008 and February 13, 2009, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on February 11, 2009.
- 6. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. The following written comments or objection letter and support letters to the owner's request for variance or variance application including letter from the current owners responding to an objection letter were received:
 - 6a. Objection letter dated December 16, 2008 signed by Norman and Elisabeth Olesen, Et al. received on December 18, 2008.
 - 6b. Letter dated February 1, 2009 from Leslie and Lance Humphreys supporting the variance application.
 - 6c. Letter dated February 1, 2009 signed by Mark Hamilton (TMK: 1-2-031:119 and 120) and Nancy Young (TMK: 1-2-031:125) stating "As the owners of properties across the road from the house in question", supporting the variance application.
 - 6d. Letter dated February 2, 2009 from Helen Green (TMK: 1-2-031:122) stating "property across the street from the house named", supporting the variance request and variance application.

- 6e. Letter dated February 4, 2009 from Robert Kirk (TMK: 1-2-031:091) supporting the variance application.
- 6f. Letter signed by owner's representative-Valerie Colter and David Reseigh supporting the owner's variance application.
- 6g. Letter dated January 31, 2009 signed by owners-Scott Roberts and Evelyn DeVault responding to comments and issues cited in letter dated December 16, 2008 signed by Norman Olesen, Et al. received on February 18, 2009 objecting to the variance application.
- 6h. Objection letter dated February 18, 2009 signed by Veronica L Jones Hughes (Executor) for The Estate of E. Donald Congo (TMK: 1-2-031:90 or vacant TMK parcel abutting subject TMK property) received on February 23, 2009.
- 6i. Letter dated March 12, 2009 from Norman F. Olesen received by the Planning Department on March 16, 2009.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The representative, on behalf of the current owners, submitted the variance application to address or resolve the dwelling encroachment constructed by the previous owner within a minimum 20 feet front yard of the subject TMK property. According to the owner's representative, the current owners were not told by the seller or aware of any dwelling encroachment during escrow. The current owners became aware of building encroachment issue after the original draftsmen and their builder ("septic installer") noticed or mentioned "the probability of a setback violation". According to the representative, a survey of the property was ordered after escrow closed. The survey map dated October 9, 2008 denotes a portion of the dwelling being constructed being constructed upon "LOT 74" pursuant to B2005-0523H encroaches into the property's minimum 15 feet front yard along Mauka Nui Street. No evidence has been found to show indifference or premeditation by previous owner-builder or current owners to deliberately construct or intentionally permit a portion of the dwelling to be built into the property's minimum front yard.

It appears that building encroachment (i.e. portion of the dwelling's foundation-approximately 132 square feet, associated wall framing including roof trusses, roofing, etc.) was built into the property's front yard. It appears that this portion of the dwelling built into the property's front yard along Mauka Nui Street went unnoticed by the previous owner and was never disclosed or mentioned during escrow to the buyers or current owners. Further, it appears that during construction of the dwelling, i.e. foundation, framing inspection, roofing, etc. between 2005 and 2008, the portion of the dwelling encroaching into the affected front yard went unnoticed by the

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previous owner-builder including residents within the subdivision and agencies inspecting building construction.

ALTERNATIVES

Alternatives available to the current owners 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 encroachments (approximately 106 square feet) or redesigning or relocating the dwelling being constructed upon "LOT 74" to fit within the correct building envelope denoted on the recent survey map or prescribed by the Zoning Code.
2. Consolidation of subject TMK or Lot 74 with rights-of-way (Mauka Nui Street) 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.

It appears that the portion of the dwelling or building encroachment was constructed or completed approximately 2-3 years ago by a previous owner and was disclosed after escrow. The survey map prepared for the current owners shows the extent of the encroachment within the minimum front yard. It appears that the dwelling built by the original owner-builder is not physically and/or visually obtrusive from property along Mauka Nui Street directly across from the subject TMK property or property near or at the intersection of Mauka Nui Street and Ole'Ole Street (both privately owned rights-of-way). The Planning Department received letters signed by surrounding property owners and abutting property owner (TMK: 1-2-031090) within the subdivision opposing and supporting the owner's request for variance and variance application. The Planning Department reviewed the letters received and weighed all comments. Several letters received from the owners of property with frontage along Mauka Nui Street directly across from the subject TMK property having a clear view of the dwelling including the encroachment being constructed upon Lot 74 support the owner's request for variance and variance application. Further, the DPW or other agency noticed the encroachment during inspection of the foundation and framing, etc. No building citations were issued to the previous owner-builder and no building issues were disclosed during the transfer of the original building permit (B2005-0523H) to current owners. As such, it is felt that the 3-year old building dwelling encroachment or dwelling footprint (As-Built) by the previous owner into the property's front yard will not depreciate or detract from the character of the immediate neighborhood and

surrounding land patterns. Therefore, it is felt that the portion of the dwelling or building encroachment identified within the property's affected front yard along Mauka Nui Street by the survey map dated October 9, 2008 does not detract from the character of the immediate neighborhood or the subdivision and is allowed to remain upon Lot 74 by variance subject variance conditions.

The representative's variance application was acknowledged by letter dated February 4, 2009 and additional time to review letters and comments received from surrounding property owners was necessary. The owner's representative agreed to extend the date on which the Planning Director shall render a decision on the subject variance to no later than March 23, 2009.

Based on the foregoing findings and unusual circumstances, the representative's request for 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 the dwelling being built upon "LOT 74" pursuant to Building Permit-B2005-0523H will not meet the minimum front yard pursuant to Chapter 25, the Zoning Code, according to the variance application's site plan map dated October 9, 2008. The approval of this variance permits portions of the 1-story dwelling to remain upon subject TMK property or "LOT 74" according to the survey map dated October 9, 2008.

The applicant or current owners shall complete improvements according to Building Permit-B2005-0523H and/or in accordance with any other building permit(s) issued to subject TMK property by the DPW-Building Division (Hilo)

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or County of Hawaii. Any further building permit and/or other construction permits issued to enlarge or change or modify the dwelling floor plan being built upon subject TMK property shall be limited the dwelling footprint permitted by variance and/or constructed upon the dwelling's footprint and within building envelope denoted on survey map dated October 8, 2008. Any building permit(s) and construction permits to complete the dwelling upon "LOT 74" shall be closed ("finaled") or completed by the DPW-Building Division prior to sale of the property or transfer of title of the subject TMK property by the current owner(s) to others.

Should the dwelling (footprint) upon Lot 74 constructed pursuant to B2005-0523H be destroyed by fire or other natural causes, the replacement or new dwelling shall comply with the County Zoning Code and be subject to State law and County ordinances and regulations pertaining to building construction and building 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 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 variance conditions not be complied with, the Planning Director may proceed to declare subject Variance-VAR 08-069 null and void.

Sincerely,



BJ LEITHEAD TODD
Acting Planning Director

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xc: Real Property Tax Office-(Hilo)
Norman Oleson, Et al.
Leslie and Lance Humphreys

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xc: Mark Hamilton and Nancy Young
Helen Green
Robert Kirk
Valerie Colter and David Reseigh
Veronica L. Jones Hughes