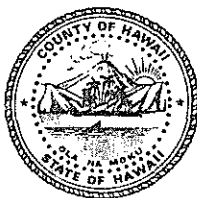


Harry Kim
Mayor



Christopher J. Yuen
Director

Roy R. Takemoto
Deputy Director

County of Hawaii

PLANNING DEPARTMENT

25 Aupuni Street, Room 109 • Hilo, Hawaii 96720-4252
(808) 961-8288 • Fax (808) 961-8742

CERTIFIED MAIL

7000 0600 0024 2905 2304

August 9, 2001

Robert D. Triantos, Esq.
CARLSMITH BALL LLP
P. O. Box 1720
Kailua-Kona, HI 96745-1720

Dear Mr. Triantos:

VARIANCE PERMIT NO. 1224 WH (VAR 01-026)

**Applicant: ROBERT D. TRIANTOS, ESQ.-
CARLSMITH BALL LLP**

Owners: MICHELE STEPHENS, ET AL.

**Request: Variance from Minimum Yards
Pursuant to Chapter 25, the Zoning Code**

Tax Map Key: 9-2-098:025, Lot 33

After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No.1224 will allow the dwelling encroachments within Lot 33's side yard(s) to remain, "AS BUILT". The dwelling encroaches 1.35 feet and 0.69 feet, respectively, into the side yards, pursuant to the site plan dated December 8, 2000. The variance request is from Lot 33's minimum twenty (20) feet side yard requirement(s), pursuant to the Zoning Code, Chapter 25, Article 5, Division 7, Section 25-5-76, Minimum yards, (a).

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BACKGROUND AND FINDINGS

1. **Location.** The subject TMK property, containing 43,608 square feet, is Lot 33, and within the "Hawaiian Ocean View Subdivision", Grant 2791, Block 198, File Plan 787, and is situated at Kahuku, Kau, Hawaii. The subject property is commonly referred or described using its tax map key (TMK) number: "TMK: 9-2-098:025, Lot 33". The subject TMK property is zoned Agricultural (A-1a) and designated Agriculture "A" by the State Land Use Commission.
2. **Application.** The applicants submitted the variance application form, supplemental information, tax clearance, and \$250.00 filing fee check on March 19, 2001.
3. **Site Plan.** The applicant's map or site plan drawing, drawn to scale and dated "December 8, 2001" was surveyed and prepared by Niels Christensen, LPLS, The Independent Hawaii Surveyors. The site plan denotes and identifies the existing "HOUSE/DECK", "house" encroachments within the side yard(s), water tank, utility pole(s), and concrete driveway, and other nearby utility or site improvements. The site plan identifies the building envelope prescribed by the Hawaii County Zoning Code. Portions of the existing dwelling and attendant roof eaves were constructed within the property's minimum 20 feet side yards. The "house" hereafter, "dwelling", encroaches 1.35 feet into the property's "western" side yard and 0.69 feet into "eastern" side yard, respectively. The side yard open space between the attendant roof eaves and respective side boundary lines exceed the minimum 14 feet side yard open space requirements.

For the record, the applicant's site plan does not denote or identify the location of an existing cesspool or other Independent Wastewater System (IWS).
4. **Building Permit(s).** A copy of the original building permit-BP 965462 opened on June 14, 1996 and associated County approved detailed building construction plans to construct the dwelling and other necessary site improvements in 1996 were not submitted with the applicant's variance application. BP 965462 and associated electrical and plumbing permits issued to the previous owner(s) were closed by the DPW-Building Division.

5. **Agency Comments and Requirements.**

- a. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated February 14, 2001 states in part the following:

"TMK(s) 3/9-2-098-025"

"This is to certify that Jean Hunt (Owner-of-record) has paid all real property taxes due the County of Hawaii up to and including 6/30/01."

- b. The State Department of Health (DOH) memorandum dated June 4, 2001, in the subject variance file states in part:

"We have no objections to the proposed variance application. However, minimum setback requirements for existing wastewater systems needs to be maintained."

- c. The Department of Public Works (DPW) memorandum dated June 8, 2001, states in part:

"We have reviewed the subject application and have no comments."

6. **Notice to Surrounding Owners.** Affidavits of mailing a first and second notice(s) were received by the Planning Department (Kona Office). For the record, it appears that the first and second notice(s) were mailed on March 19, 2001 and June 1, 2001, respectively.

7. **Comments from Surrounding Property Owners or Public.** One objection letter was received from Stephan and Nancy Kuster.

SPECIAL AND UNUSUAL CIRCUMSTANCES

In consideration of the applicant's submittals and findings above, it appears that "corners" of the 2-story dwelling built on the subject TMK property encroach into the respective side yard(s). It appears that the encroachment's amount to no more than 5.0 square feet +/- of the dwelling's overall living area. The bulk of the dwelling/deck or the dwelling's enclosed living area and attendant roof eaves are within the building envelope prescribed by the Zoning Code and meet all other minimum yard(s) and open space requirements.

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The applicant submitted a recent survey map/site plan prepared by a surveyor that identifies the location of the existing dwelling's encroachments within the respective side yard(s). The site plan denotes and identifies distances between dwelling's (corners) wall and attendant roof eaves from the respective side boundary line(s). It appears that corner(s) of the dwelling were inadvertently built 1.35 feet and 0.69 feet into the respective side yard(s). It appears that the current owner(s) were unaware of the building encroachment issues or problem.

Therefore, considering the applicant's submittals, findings, and circumstances, it is felt there are special or unusual circumstances applying to the subject property which exist either to a degree which deprives the applicants of substantial property rights that would otherwise be available, or to a degree which obviously interferes with the current and best use of the subject property.

ALTERNATIVES

At this time there are no reasonable alternatives in resolving the difficulty of the applicant or current owner(s). Alternatives available to the current owner(s) or applicant to address and correct the existing building encroachments include the following actions:

1. Remove or truncate both "corners" and attendant roof eaves that encroach into the respective side yard(s).
2. Redesign and relocate the existing dwelling to fit within the building envelope prescribed by the Zoning Code and other design and remedial building alternatives.
3. Consolidate Lot 33 with respective adjacent lots and resubdivide the property back into like areas and shift or adjust common side boundary lines accordingly to meet minimum building lines and minimum side yard requirements.

To require or impose removal of the respective "corner" or dwelling's encroachments and modifying the attendant roof eave(s) within the side yards would seem unreasonably harsh and uneconomical at this time. The removal of the building encroachments or relocation of these existing improvements may disrupt the dwelling's structural integrity, change internal room lighting and air circulation, and change the building's overall building geometry and exterior building character. Pursuant to the applicant, the consolidation and subdivision option, pursuant to Chapter 23, Subdivisions, Section 23-7, is not available.

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No evidence has been found to show indifference or premeditation by the applicant or past/current owner(s) to deliberately build or intentionally allow the building encroachment problem or issues to occur. The applicant submitted the variance application to address and resolve the dwelling's encroachment problem within the respective side yard(s).

The Planning Department acknowledges there may be other design or building alternatives available to the applicants and owners beyond those cited above. However, these design and building alternatives are deemed to be unreasonable at this time and would place excessive demands on the applicant and current owners when a more reasonable alternative is available by the granting of the subject variance request.

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) and boundary/property lines. It appears that the existing dwelling was constructed under a building permit issued to previous owner(s) by the County. It appears that the building inspections of the premises, during building construction, and throughout the life of the building permit did not disclose any encroachments into the respective side yards or building irregularities. County records indicate building permit (BP 965462) issued by the DPW-Building Division to construct the dwelling was closed by the DPW-Building Division on May 19, 1999. The applicant and current owners are trying to resolve building encroachment problems that were disclosed after a modern survey of the existing TMK property was performed and a map of existing TMK property was prepared.

The circumstances to allow and permit the existing building and dwelling encroachments to be built within the respective side yard(s) over 5 years ago are unique.

It appears that the commencement of building activity and the dwelling encroachments built into or within that affected side yard(s) in 1996 were not perceptible and not physically and visually obtrusive from adjacent TMK property(s) or the rights-of-way. It appears the 5 year old + dwelling encroachments do not depreciate or detract from the character of the surrounding neighborhood and the existing and surrounding land patterns. It appears the existing dwelling encroachment within both side yard(s) was a builder's mistake which occurred in 1996 or a misinterpretation of the minimum building yards or boundary line(s) by the previous owner or owner's builder. Inspection of the TMK property during the life of the building permit issued by the County and other agencies did not discover any dwelling encroachment problem or reveal and disclose any irregular building problems. Therefore, it is felt that the existing dwelling encroachments within the respective side yard(s) will not detract from the character of the immediate neighborhood or other surrounding property within the subdivision.

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The subject variance application was acknowledged by certified letter dated May 24, 2001. The applicant's agent agreed to extend the date on which the Planning Director shall render a decision on the subject variance.

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.

VARIANCE DECISION AND CONDITIONS

The variance request is approved subject to the following conditions:

1. The applicant/owner(s), 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 permit.
3. Portions of the existing dwelling encroach into the respective side yard(s) and do not meet minimum side yard(s) requirements, pursuant to Chapter 25, the Zoning Code. The approval of this variance allows the dwelling and the respective encroachments identified on the applicant's site plan dated December 8, 2000 to remain on the subject TMK property.

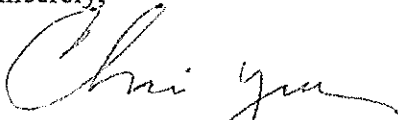
Future building improvements and permitted uses on Lot 33 or subject TMK property shall be subject to State law and County ordinances and regulations pertaining to building construction and building occupancy.

4. No ohana permit shall be granted to allow an ohana dwelling on the subject TMK property and no building permit(s) shall be issued to allow an ohana dwelling unit or second dwelling unit to be constructed or established on the subject TMK property.

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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:cps

PA\WP66\WRY\FORMLETT\VARAPPTMK92098025.RDTE5Q

xc: Real Property Tax Office - Kona
Planning Dept. - Kona
Stephan and Nancy Kuster