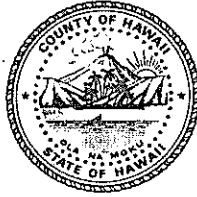


Harry Kim  
Mayor



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 2281

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. 1225 WH (VAR 01-027)**  
**Applicant: ROBERT D. TRIANTOS, ESQ.-**  
**CARLSMITH BALL LLP**  
**Owners: LOU E. LAMBERT TRUST**  
**Request: Variance from Minimum Yards**  
**and Open Space Requirement,**  
**Pursuant to Chapter 25, the Zoning Code**  
**Tax Map Key: 7-3-031:031, Lot 117**

After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No.1225 allows portions of an existing dwelling, enclosed carport storage area, and attached carport that encroach within the subject property's minimum yards to remain, "AS BUILT". The variance allows a portion of the dwelling to remain with minimum side yard(s) of between 8.3 feet and 8.7 feet; allows the attached carport (storage area) to remain with a minimum 9.0 feet side yard; and, allows affected portions of the dwelling's carport to remain with minimum rear yard(s) of between 19.4 feet and 19.8 feet and minimum 12.9 feet rear yard open space, respectively, pursuant to the applicant' site plan dated March 1, 2001. The variance is from the property's minimum ten (10) feet side yard, twenty (20) feet rear yard, and fourteen (14) feet open space requirement(s), pursuant to the Zoning Code, Chapter 25, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), Section 25-5-77, Other regulations, and Section 25-4-44, Permitted projections into yards and open spaces.

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BACKGROUND AND FINDINGS

1. **Location.** The subject TMK property, containing 10,476 square feet, is Lot 117, and is situated within the "Kona Palisade Subdivision", Unit I, File Plan 1061, at Kalaoa 5<sup>th</sup>, North Kona, Hawaii. The subject property is commonly referred or described using its tax map key (TMK) number: "TMK: (3) 7-3-031:031, Lot 117". The subject TMK property is zoned Agricultural (A-5a) and designated Urban "U" 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 "March 1, 2001" was surveyed and prepared by Kevin McMillen, LPLS, of KKM Surveys. The site plan denotes and identifies the existing Dwelling and Carport encroachments within the side yard, rear yard and respective open yard spaces and other site improvements. The site plan identifies the building envelope prescribed by the Hawaii County Zoning Code. Portions of the existing dwelling and attached carport and attendant roof eaves were constructed within the respective side yard(s), rear yard, and respective rear yard open space.  
  
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 996148 opened on October 8, 1999 and associated County approved detailed building construction plans to construct the dwelling and other necessary site improvements in 1999 were not submitted with the applicant's variance application. BP 996148 and associated electrical and plumbing permits were closed by the DPW-Building Division.

5. **Agency Comments and Requirements.**

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

"TMK(s) 3/7-3-031-031"

"This is to certify that Lou Lambert (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.** No other written comments or objection letters were received.

SPECIAL AND UNUSUAL CIRCUMSTANCES

In consideration of the applicant's submittals and findings above, it appears that portions of the dwelling and carport constructed in 1999, encroach into the respective yard(s) of the subject TMK property pursuant to Chapter 25, the Zoning Code. It appears that the building encroachments amount to no more than 65.0 square feet +/- of the dwelling's overall living area. The bulk of the dwelling's living area, attached carport, and attendant roof eaves are within the building envelope prescribed by the Zoning Code and meet minimum yard(s) and open space requirements.

The applicant submitted a recent survey map/site plan prepared by a surveyor which identifies the location of the existing dwelling, carport, and roof eave encroachments within the affected yard(s). The site plan denotes and identifies distances between the dwelling's wall, carport storage area, and attendant roof eaves from the respective boundary line(s). A portion of the dwelling was built 1.7 to 1.3 feet into a side yard(s). A portion of the carport's storage area was built 1.0 feet into the side yard. And, other affected portion of the carport storage area and carport encroach between 0.2 feet to 0.6 feet into the rear yard and a portion of the carport's eave encroaches 1.1 feet into the rear yard open space requirements. It appears that the previous and current owner(s) were unaware of any 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 the dwelling encroachments and truncate "corners" of the carport and attendant roof eaves that encroach into the respective yard(s).
2. Redesign and relocate the existing dwelling and carport to fit within the building envelope prescribed by the Zoning Code and other design and remedial building alternatives.
3. Consolidate Lot 117 with respective adjacent lots and resubdivide the property back into like areas and shift or adjust affected side and rear yards accordingly to meet minimum building lines and minimum yard and open space requirements.

To require or impose removal of the dwelling's encroachments and carport's "corners" and modifying the attendant roof eave(s) to meet open yard requirements 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 and carport's structural integrity, change internal room lighting and air circulation, and change the building's overall building geometry and exterior 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 problems to occur. The applicant submitted the variance application to address and resolve the dwelling's encroachment problem within the affected yard(s) and rear yard open space.

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 affected yards or any other building irregularities. BP 996148 issued by the DPW-Building Division to construct the dwelling and attached carport was closed by the DPW-Building Division on July 21, 2000 together with other associated electrical and mechanical permits issued. 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 that affected yard(s) and rear yard open space over 2 years ago are unique.

It appears that the commencement of building activity and the dwelling encroachments built into or within that affected yard(s) in 1999 were not perceptible and not physically and visually obtrusive from adjacent TMK property(s) or the rights-of-way. It appears the 2 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 encroachment(s) within the affected yards was a contractor or builder's mistake which occurred in 1999 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, electrical, and mechanical permits did not discover any dwelling encroachment problem or reveal and disclose any irregular building problems. Therefore, it is felt that the existing dwelling and carport encroachments within the respective side yard(s) and rear yard(s) will not detract from the character of the immediate neighborhood or other surrounding property within the subdivision.

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.
3. Portions of the existing dwelling and carport encroach into the property's side and rear yard(s) and attendant open space required by Chapter 25, the Zoning Code. The approval of this variance allows the dwelling and attached carport and the respective encroachments within the affected yards and identified on the applicant's site plan dated March 1, 2001, to remain, "AS BUILT", on the subject TMK property.

Future building improvements and permitted uses on Lot 117 or the 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.

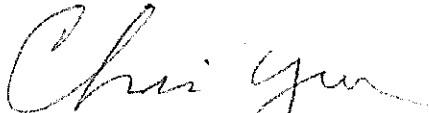
Robert D. Triantos, Esq.  
CARLSMITH BALL LLP

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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

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xc: Real Property Tax Office - Kona  
Planning Dept. - Kona