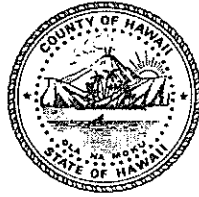


Harry Kim  
Mayor



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

December 17, 2001

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

Dear Mr. Triantos:

**VARIANCE PERMIT NO. 1243 WH (VAR 01-047)**  
**Applicant: ROBERT D. TRIANTOS, ESQ.**  
**Agent: CARLSMITH BALL LLP**  
**Owners: ISLAND RESTAURANTS**  
**dba DURTY JAKES CAFE**  
**Request: Variance from Minimum**  
**Open Space Requirements,**  
**Pursuant to Chapter 25, the Zoning Code**  
**Tax Map Key: 7-5-009:027, Lot 3, (SMA/KVSDC)**

After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request subject to conditions stated herein. Variance Permit No.1243 allows portions of an existing awning to remain within the subject property's minimum front open space requirement along Alii Drive to remain, "AS BUILT". There is a minimum 5.42 feet front yard open space between the edge of the existing awning and affected front boundary according to a site plan dated May 1, 2001. The variance is from the property's minimum fourteen (14) feet open space requirement(s), pursuant to the Zoning Code, Chapter 25, Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open spaces.

### **BACKGROUND AND FINDINGS**

1. **Location.** The subject property or tax map key (TMK) property (Lot 3) is bounded by and shares a common boundary line along Alii Drive. The property contains approximately 21,998 square feet +/- and is a portion of Land Court Application 1874 situated at Auhaueake 2<sup>nd</sup>, North Kona, Hawaii.

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2. The subject TMK property is zoned Resort (V-.75) and designated Urban "U" by the State Land Use Commission. The property is within the County's Special Management Area (SMA) and the Kailua Special Design District (KVDD).
3. **Application.** The applicants submitted the variance application form, supplemental information, tax clearance, and \$250.00 filing fee check on May 22, 2001.
4. **Site Plan.** The applicant's map or site plan drawing, drawn to scale and dated "5/1/2001" was prepared by Paul Bleck, AIA. The site plan denotes and identifies the location of awning encroachments (Maximum: 8.58') within the subject TMK property's required 14.00' wide ("LIMIT OF ALLOWABLE PROJECTIONS INTO FRONT YARD SETBACK") open space area along Alii Drive. The applicant is requesting a variance to allow a 5.42' to 8.64' front yard open space setback for the existing awnings in lieu of the required 14'-0" wide front yard open clear space setback from the front boundary line along Alii Drive.

For the record, it appears that the existing awning encroachments do not affect the location of any existing cesspool/Independent Wastewater System (IWS) or existing sewer tie in/connections.

5. **Building Permit(s).** It appears that the awning encroachment issues were discovered during routine building inspection "vis-à-vis" a building permit issued to the TMK property. The variance application was submitted to address DPW-Building Division's issues. Any further building permits requirements will be addressed by the applicant/owner(s) and the DPW.

6. **Agency Comments and Requirements.**

- a. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated April 24, 2001 states in part the following:

"TMK(s): (3) 7-5-009-027"

"This is to certify that Brian & Jean G. Anderson (owner of record) has paid all Real Property Taxes due the County of Hawaii up to and including June 30, 2001."

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- b. The State Department of Health (DOH) memorandum dated August 15, 2001, in the subject variance file states in part:

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

- c. No comments that The Department of Public Works (DPW) memorandum dated June 8, 2001, states in part:

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

7. **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.
8. **Comments from Surrounding Property Owners or Public.** No other written agency comments or objections from the surrounding property owners or the public were received.

#### **SPECIAL AND UNUSUAL CIRCUMSTANCES**

In consideration of the applicant's submittals and findings above, it appears that portions of the existing awning building improvements were designed for shade and protection to patrons within the lower areas. The bulk of the buildings area 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 the project architect which identifies the location of the existing building location(s) and roof (awning) eave encroachments within the property's front yard open space requirement along Alii Drive. "The Applicant's intent was to create some form of a protective device for his customers with the installation of the existing roof awnings".

Therefore, considering the applicant's submittals, findings, existing building location(s) and building orientation, and other property 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.

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### 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 awning encroachments and truncate "corners" of the existing building and attendant roof (awnings) eaves that encroach into the respective "open space" required within the property's front yard.
2. Redesign and relocate the existing buildings or reorient the building(s) or uses to fit within the building envelope prescribed by the Zoning Code and other design and remedial building alternatives.
3. Consolidate the subject TMK property with respective right-of-way and resubdivide the resultant bulk lot property back into like areas to shift or adjust affected front yards accordingly to meet minimum building lines and minimum yard and open space requirements.

To require or impose removal of the building's encroachments 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 existing commercial building's structural integrity, change internal room lighting and air circulation, and change the building's overall building geometry and exterior character. The consolidation and subdivision option, pursuant to Chapter 23, Subdivisions, Section 23-7, would be cumbersome and is not a viable option in this matter.

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 building awnings encroachment problem within the affected front 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.

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### 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 building or commercial resort building development was constructed under building permit(s) issued to allow the development to occur. It appears that the building inspections of the premises, during building construction, and throughout the life of the building permit did not disclose any potential encroachment problems, design deficiencies, and other building irregularities. The applicant and current owners are trying to resolve building encroachment problems that were disclosed after a building permit was issued and commencement of construction of these building improvements approved or sanctioned by the building permit.

The circumstances to allow and permit the existing building encroachments to be built within that affected front yard open space required by the Zoning Code are unique.

It appears that the commencement of building activity and the building encroachments were not perceptible and not physically and visually obtrusive from adjacent TMK property(s) or the rights-of-way. It appears these existing building encroachments do not depreciate or detract from the character of the surrounding neighborhood and the existing and surrounding land patterns. Therefore, it is felt that the existing awning encroachments within the respective front yard open space required by the Zoning Code will not detract from the character of the immediate neighborhood or other surrounding resort area/Kailua Village Design Plan.

The subject variance application was acknowledged by certified letter dated August 1, 2001. The applicant's agent agreed to extend the variance decision date to December 14, 2001, whereupon on or before said decision date, 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.

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### VARIANCE DECISION AND CONDITIONS

The variance request is approved subject to the following conditions effective December 14, 2001:

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 awning encroach into the subject TMK property's minimum fourteen (14) feet front yard open space required between the building "projection" (Roof Awning) and the front boundary line along Alii Drive. The approval of this variance allows these existing building improvements (awning) to remain, "AS BUILT" according to the variance application's site plan dated May 1, 2001.

The status of existing DPW building permits issued to the subject TMK property and any further building permits required by the DPW to allow the existing awning improvements shall be addressed by the current owner(s) or applicant. All DPW building permits and associated construction permits issued to the subject TMK property shall be "finaled" or closed prior to any change in management, business rents/leases, and change in property title.

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

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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

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