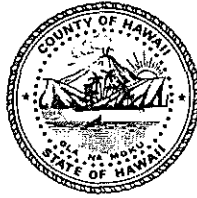


Harry Kim  
Mayor



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. 1244 WH (VAR 01-050)**  
**Applicant: ROBERT D. TRIANTOS, ESQ.**  
**Agent: CARLSMITH BALL LLP**  
**Owners: TERRY V. ALLEN, ET AL.**  
**Request: Variance from Minimum Yards and  
Open Space Requirements,  
Pursuant to Chapter 25, the Zoning Code**  
**Tax Map Key: 7-5-029:020, Lot 76**

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. 1244 allows portions of the dwelling's carport, enclosed storage building, and other improvements located with the respective yards and corresponding open space requirements to remain on the property, "As Built", and allows the enclosure of certain existing areas for privacy and security according to applicant's site plan dated June 1, 2001. The existing dwelling/carport encroach a maximum 5.4 feet into the property's minimum twenty (20) feet front yard and 0.2 feet into the ten (10) feet side yard, respectively. The corresponding eaves encroach between 0.9 to 3.7 feet into the minimum fourteen (14) feet open space requirement. The variance is from 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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Robert D. Triantos, Esq.  
CARLSMITH BALL LLP  
Page 2  
December 17, 2001

## BACKGROUND AND FINDINGS

1. **Location.** The subject TMK (tax map key) 7-5-029:020 property, containing 10,089 square feet, is Lot 76 of the Kona Heights Subdivision, Increment 2, File Plan 1077, at Hienaloli 5<sup>th</sup> and 6<sup>th</sup> North Kona, Hawaii.
2. The subject TMK property is zoned Agricultural (A-5a) and designated Urban "U" by the State Land Use Commission.
3. **Application.** The applicants submitted the variance application form, supplemental information, tax clearance, and \$250.00 filing fee check on June 15, 2001.
4. **Site Plan.** The applicant's map or site plan drawing, drawn to scale and dated "6/1/2001" was surveyed and prepared by Kevin McMillen, LPLS, of KKM Surveys. The site plan denotes and identifies the existing encroachments within the affected yards, respective open yard spaces, and identifies some unpermitted structures to be removed. The site plan identifies the building envelope prescribed by the Hawaii County Zoning Code. Subsequent to resolve of the encroachment issues, the applicant/owner(s) would like to enclose portions of the existing dwelling-carport, enclosed storage room and restore any attendant roof eaves constructed within the respective yard(s) and affected open space requirements for privacy and security reasons.

**Note:** The applicant's site plan denotes and identifies the location of existing CRM Wall/Chain link fence(s)/wood fence and other site or landscaping improvements located on or within the subject TMK property. The location of an existing cesspool or independent wastewater system (IWS) is not denoted or identified. Any wall, fences and landscaping straddling Lot 76's boundary line(s) or other boundary problems must be addressed and resolved by the affected parties and are not addressed by the variance request.

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP  
Page 3  
December 17, 2001

5. **Building Permit(s).** All DPW building permits and associated electrical and plumbing permits issued to allow the building improvements on the subject TMK property were closed by the DPW-Building Division.
6. **Agency Comments and Requirements.**
  - a. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated June 13, 2001 states in part the following:  
  
"TMK(s) 3/7-5-029-020"  
  
"This is to certify that Terry Allen (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 August 15, 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 September 4, 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) submitted by the applicant show first and second notice(s) were mailed on June 15, 2001 and June 1, 2001, respectively.
8. **Comments from Surrounding Property Owners or Public.** No oral or written comments or objection letters were received.

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP  
Page 4  
December 17, 2001

### **SPECIAL AND UNUSUAL CIRCUMSTANCES**

In consideration of the applicant's submittals and findings above, it appears that portions of the the existing dwelling/carport were originally constructed within the respective yard(s) and open spaces of the subject TMK property pursuant to Chapter 25, the Zoning Code. It appears that the 23 year old building encroachments were inadvertently constructed in 1978 outside the "buildable area" or building envelope defined by the minimum building yards of the Zoning Code. The bulk of the existing 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 site plan identifies and denotes the location of a "Lattice Shed" constructed along the rear boundary line and within a southwestern portion of the subject TMK property. The "Lattice Shed" improvements were constructed or built without a building permit. Portions of the "Lattice Shed" straddle a common boundary line shared by the subject TMK property (Lot 76) and adjoining Lot 72 and encroach into Lot 72. The applicant on behalf of the respective owner(s) has stated that the unpermitted "Lattice Shed" will be removed. As such, the existence and location of the "Lattice Shed" is not part of the subject variance request and shall be demolished per variance condition cited below or may be relocated within the building envelope subject to DPW permit requirements.

It appears that the building encroachment problems were discovered during the sale of the subject property. The applicant submitted a recent survey map/site plan that identifies the location of the existing dwelling and other site improvements. This site plan denotes distances between portions of the dwelling improvements and attendant roof eaves from the affected boundary line(s). Portions of the existing dwelling and attached carport were constructed into minimum yards and respective open spaces required by the Zoning Code. It appears the previous and current owner(s) were unaware of the building encroachment problems. No evidence has been found to show indifference or premeditation by the previous owner(s) to deliberately create or intentionally allow the building encroachment problems to occur.

It appears that the existing dwelling improvements were constructed under valid building permits issued to the previous owners. It appears that building inspections of the premises during building construction throughout the life of the building permits did not disclose any building encroachments or building setback irregularities.

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP  
Page 5  
December 17, 2001

Therefore, considering the applicant's submittals, findings, and existing circumstances at this time, 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 existing building encroachments and truncate "corners" of the carport and attendant roof eaves that encroach into the respective yard(s) and open spaces required by the Zoning Code.
2. Redesign and relocate the existing dwelling/carport/storage room improvements to fit within the building envelope prescribed by the Zoning Code and other design and remedial building alternatives.
3. Consolidate the subject property with the adjoining lots and resubdivide the property back into like areas and shift or adjust affected yards accordingly to provide minimum building lines, minimum yards, and other associated open space requirements.

To require or impose removal of the dwelling's encroachments, carport's "corners", and modifying the attendant roof eave(s) to meet the Zoning Code's minimum yards and 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.

No evidence has been found to show indifference or premeditation by the applicant or past/current owners to deliberately build or intentionally allow the building encroachment problems to be created nearly 23 years ago. The applicant submitted the variance application to address and resolve these 23 year old building encroachments within the affected yard(s) and open space requirements of the Zoning Code.

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP

Page 6

December 17, 2001

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 or 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. The existing dwelling and carport building improvements were constructed under a series of building permits issued by the County in 1978 and 1980. It appears that the building inspections of the premises, during building construction, and throughout the life of the building permits did not disclose any encroachments into the affected yards or any other building irregularities. The building issued by the DPW-Building Division to construct the dwelling and attached carport on the subject TMK property were closed by the DPW-Building Division 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 and existing site improvements was performed and a map of existing TMK property showing and identifying the existing building improvements was prepared during escrow.

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 approximately 23 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 1978 or 1980 were not perceptible and not physically and visually obtrusive from adjacent TMK property(s) or the rights-of-way. It appears the 23 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 1978/1980 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 problems or reveal and disclose any irregular building problems. Therefore, it is felt that the existing dwelling and carport encroachments within those respective yard(s) and attendant open spaces required by the Zoning Code will not detract from the character of the immediate neighborhood or other surrounding property within the subdivision.

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP  
Page 7  
December 17, 2001

The subject variance application was acknowledged by certified letter dated August 1, 2001. The applicant's agent agreed to extend the 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.

#### **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 dwelling and carport encroach into the respective front, rear, and side yard(s) and attendant open space required by Chapter 25, the Zoning Code and are identified on a site plan submitted with the variance application. The approval of this variance allows the permitted dwelling and attached carport and the respective encroachments within the affected yards and identified on the applicant's site plan dated June 1, 2001, to remain, "AS BUILT", on the subject TMK property.

The existing "Lattice Shed" encroachments within Lot 72 shall be removed immediately and the remainder of the "Lattice Shed" on Lot 76 shall be removed or reconstructed on Lot 76 subject to all Zoning Code and Building Code requirements. The status of the "Lattice Shed" shall be addressed by the applicant or the current owner(s) prior to the close of escrow or any further change to property title.

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP

Page 8

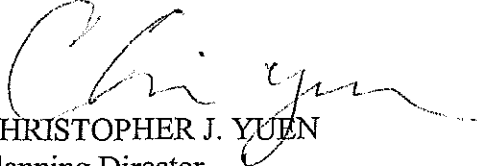
December 17, 2001

The request to enclose the existing carport is allowed provided the additional building allowances to compensate for the wall additions, window/door casing or the other similar architectural features will be limited to a maximum 0.5 feet or 6 inches +/- . The proposed enclosure or other permitted building improvements related to the enclosure of the carport or changes to the existing dwelling shall be subject to DPW-Building Division requirements.

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 building additions or improvements and permitted uses on Lot 76 or the subject TMK property 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:cps

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