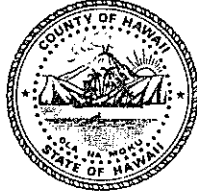


Harry Kim  
Mayor



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. 1245 WH (VAR 01-059)**  
**Applicant: ROBERT D. TRIANTOS, ESQ.**  
**Agent: CARLSMITH BALL LLP**  
**Owner: JERRY J. FAGG JR., TRUSTEE**  
**Request: Variance from Minimum Yards and**  
**Open Space Requirements,**  
**Pursuant to Chapter 25, the Zoning Code**  
**Tax Map Key: 7-3-016:013, Lot 70**

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. 1245 allows portions of the dwelling and other site improvements located with the respective yards and corresponding clear space requirements to remain on the property, "As Built", according to applicant's site plan dated July 25, 2001. The dwelling's (House) living areas encroach a maximum 8.8 feet into the property's minimum fifteen (15) feet front yard and 1.2 feet into the minimum fifteen (15) feet rear yard, respectively, and a maximum 3.7 feet into the maximum eight (8) feet side yard; and the affected front yard clear space requirements. The roof eave encroaches a maximum 9.0 feet into the property's minimum 10 feet front yard clear space and a maximum 3.1 feet into the minimum 4 feet side yard open space open space requirement, respectively. 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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## BACKGROUND AND FINDINGS

1. **Location.** The subject TMK (tax map key) 7-3-016:013 property, containing 7509 square feet, is Lot 70 and portion of Kona Wonder View Lots, File Plan 763, Grant 3027, Kalaoa 2<sup>nd</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 July 30, 2001.
4. **Site Plan.** The applicant's map or site plan drawing, drawn to scale and dated "7/25/2001" 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. The site plan identifies the building envelope prescribed by the Hawaii County Zoning Code.  
**Note:** The applicant's site plan does not denote or identify the location of an existing cesspool or other Independent Wastewater System (IWS). Any existing wall or other fence encroachments straddling or along the subject TMK boundary lines must be resolved by the affected parties and are not addressed by this variance.
5. **Building Permit(s).** All DPW building permits and associated electrical and plumbing permits issued in the 1970s to allow the existing 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 July 18, 2001 states in part the following:

"TMK(s) 3/7-3-16-13"

"This is to certify that Jerome J. Fagg (owner of record) has paid all Real Property Taxes due the County of Hawaii up to and including 6/30/01."

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- b. The State Department of Health (DOH) memorandum dated August 27, 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. To date no comments from the Department of Public Works (DPW) were received or introduced into the subject variance file.
6. **Notice to Surrounding Property Owners.** Affidavits of mailing a first and second notice(s) submitted by the applicant show first and second notice(s) were mailed on July 30, 2001 and August 27, 2001, respectively.
  7. **Comments from Surrounding Property Owners or Public.** No oral or 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 existing dwelling (House) were originally constructed in 1970 and encroach into the respective yard(s) and open spaces of the subject TMK property pursuant to Chapter 25, the Zoning Code. It appears that the 30 + year old building encroachments were inadvertently constructed in during the 1970s outside the "buildable area" or building envelope defined by the Zoning Code's minimum building yards and open space requirements. The bulk of the existing dwelling's living area and attendant roof eaves are within the building envelope prescribed by the Zoning Code and meet minimum yard(s) and open space 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 and attendant roof eaves from the affected boundary line(s). Portions of the existing dwelling improvements were constructed into minimum yards and respective open space requirements. It appears the previous and current owner(s) were unaware of the building encroachment problem. 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.

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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 setback irregularities.

Therefore, considering the applicant's submittals, findings, and other 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 existing building encroachments and truncate "corners" of the dwelling 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 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 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 owners to deliberately build or intentionally allow the building encroachment problems to be created nearly 30 + years ago. The applicant submitted the variance application to address and resolve the 31 year old building encroachment problem within the affected yard(s) and the attendant open space requirements of the Zoning Code.

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 in 1970 by the County. 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 permits and associated construction permits issued by the DPW-Building Division to construct the dwelling and allow other site improvements on the subject TMK property were closed by the DPW-Building Division. 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 31 year old building and dwelling encroachments to be built within that affected yard(s) and respective open space requirements of the Zoning Code are unique.

It appears that the commencement of building activity and the dwelling encroachments built into or within that affected yard(s) in 1970 were not perceptible and not physically and visually obtrusive from adjacent TMK property(s) or the rights-of-way. It appears the 31 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 1970 or a misinterpretation of the minimum building yards or boundary line(s) interpretation

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utilizing a "rock wall" 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 encroachments within the 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.

The subject variance application was acknowledged by certified letter dated August 14, 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 (House) and roof eaves encroach into the respective front, rear, and side yard(s) and attendant open space required by Chapter 25, the Zoning Code. These building distances between the respective building encroachments and respective boundary lines are identified on the applicant's site plan submitted with the variance application. The approval of this variance allows the dwelling and these building encroachments identified on the applicant's site plan dated July 25, 2001, to remain, "AS BUILT", on the subject TMK property.

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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 improvements and permitted uses on Lot 70 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