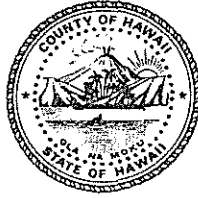


Harry Kim
Mayor



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. 1246 WH (VAR 01-060)
Applicant: ROBERT D. TRIANTOS, ESQ.
Agent: CARLSMITH BALL LLP
Owners: PIO PARTNERS
Request: Variance from Minimum Yards
Pursuant to Chapter 25, the Zoning Code
Tax Map Key: 7-3-033:004, Lot 4

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. 1246 allows portions of the dwelling and other improvements located with the respective yards to remain on the property, "As Built", according to applicant's site plan dated June 22, 2001. According to this site plan portions of the existing dwelling encroach between 0.1 to 0.5 feet, respectively, into the property's minimum ten (10) feet side yard(s). The variance request is from the Zoning Code, Chapter 25, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), and Section 25-5-77, Other regulations.

BACKGROUND AND FINDINGS

1. **Location.** The subject TMK (tax map key) 7-3-033:004 property, containing 10,585 square feet, is Lot 4 of the Kona Palisades Subdivision, Unit II, File Plan 1087, being a portion of Grant 2972 to Kaapau and Kama, and situated at Kalaoa 5th, North Kona, Hawaii.

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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 "June 22, 2001" was surveyed and prepared by Chrystal T. Yamasaki, LPLS of Wes Thomas Associates. The site plan denotes and identifies the existing encroachments within the affected and respective side yards. The site plan identifies the building envelope prescribed by the Hawaii County Zoning Code.
Note: The applicant's site plan denotes and identifies the location of existing CRM retaining wall straddling a common side boundary line between Lot 4 (subject TMK property) and Lot 3. The location of this CRM retaining wall and other site improvements straddling or along common boundary lines must be resolved by the affected parties and are not addressed by the variance request.
5. **Building Permit(s).** County records indicate all building permits and associated construction permits issued to the subject TMK property by the DPW-Building Division were closed.
6. **Agency Comments and Requirements.**
 - a. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated July 7, 2001 states in part the following:

"TMK(s) 3/7-3-033-004"

"This is to certify that Rachel Humphreys (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 27, 2001, in the subject variance file states in part:

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

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- 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.”

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 small portions of the dwelling were recently constructed within the respective side yard(s) of Chapter 25, the Zoning Code. It appears that these building encroachments were inadvertently constructed outside the building envelope defined by the minimum building yards of the Zoning Code. 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 these small building encroachments were discovered after a recent survey map was prepared for the applicant or escrow purposes. The recent survey map submitted with the variance request identifies and denotes the distance between portions of the dwelling and attendant roof eaves from the Lot 4's boundary lines. Portions of the dwelling were constructed within the minimum 10 foot side yard. It appears that the current owners or developer were not aware of these encroachments into the side yards. No evidence has been found to show indifference or premeditation by the owners or builders to deliberately create or intentionally allow the building encroachment problems to occur.

It appears that the existing dwelling was recently constructed under a valid building permit and other associated construction permits. It appears that the building inspections of the premises, during building construction and throughout the life of the building permit did not disclose any building encroachments or setback irregularities.

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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 existing building encroachments and modify attendant roof eaves that encroach into the respective side yard(s) 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 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 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.

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. The applicant submitted the variance application to address and resolve the encroachment problem within the affected yard(s) prescribed by the Zoning Code.

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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 improvements were constructed under a recent building permit issued 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 issued by the DPW-Building Division to construct the dwelling 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, "AS BUILT" was prepared for escrow.

The circumstances to allow and permit the existing building and dwelling encroachments to be built within that affected yard(s) and are unique.

It appears that the commencement of building activity and the dwelling encroachments built into or within that affected yard(s) recently were not perceptible and not physically and visually obtrusive from adjacent TMK property(s) or the rights-of-way. It appears these small and recent 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 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 encroachments within Lot 4's respective side 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.

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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 into the respective side yard(s) 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 dwelling and the respective encroachments within the affected yards and identified on the applicant's site plan dated June 22, 2001, to remain, "AS BUILT", on the subject TMK property.
4. Future building improvements and permitted uses on Lot 4 or the 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

WRY:cps

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