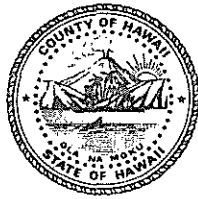


Harry Kim  
Mayor



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

### CORRECTED COPY

May 1, 2001

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

Dear Mr. Triantos:

**VARIANCE PERMIT NO. 1278 WH (VAR 01-083)**

**Applicant: ROBERT D. TRIANTOS, ESQ.**  
**Agent: CARLSMITH BALL LLP**  
**Owners: DAVID M. SPAULDING, ET AL.**  
**Request: Variance from Minimum Yards and  
Open Space Requirements,  
Pursuant to Chapter 25, the Zoning Code**  
**Tax Map Key: 8-7-016:005, Lot 104**

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. 1278 allows portions of the dwelling's water tank and attendant water tank roof or "eave" improvements located within a side yard and attendant side yard open space requirements to remain on the property, "AS BUILT", according to applicant's site plan dated April 9, 1998. The water tank (wall) encroaches a maximum 4.90 feet into one of property's minimum eight (8) feet side yard requirement and portions of the water tank's roof or "eave" encroaches between 0.80 feet to 1.40 feet into the attendant minimum four (4) feet side yard open space requirement. The variance request is from Lot 104's minimum yards and open space requirements 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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Robert D. Triantos, Esq.  
CARLSMITH BALL LLP  
Page 2  
May 1, 2002

## **BACKGROUND AND FINDINGS**

1. **Location and Zoning.** The subject property, Lot 104 containing 9112 square feet, is within the Kona Paradise Subdivision, being a portion of Royal Patent 7739, Mahele Award 25 to Nahua, and situated at Kaohe 4<sup>th</sup>, South Kona, Hawaii.

The subject TMK property is zoned Agricultural (A-5a) and designated Agriculture "A" by the State Land Use Commission.

2. **Application.** The applicant (agent) submitted the variance application form, supplemental information, tax clearance, and \$250.00 filing fee check to the Kona Planning Department on November 13, 2001.
3. **Site Plan.** The applicant's map or site plan drawing, drawn to scale and dated April 9, 1998 was surveyed and prepared by Wes Thomas Associates. The site plan denotes and identifies the water tank and "eave" encroachments within the affected side yard, respective side yard open yard spaces, and identifies the location of the existing concrete cesspool encroachments into Lot 105. The site plan identifies the building envelope prescribed by the Hawaii County Zoning Code. The variance request addresses only the water tank encroachments into minimum side yard and corresponding side yard open space requirements and issues of the Zoning Code.  
**Note:** The location of a the existing cesspool/concrete cap denoted on the site plan and straddling the common side yard boundary line of Lot 104 and encroaching into Lot 105 must be addressed and resolved by the affected parties with the State Department of Health. (Refer to the respective variance condition(s) listed at the end of this permit letter)
4. **Building Permit(s).** It appears that all building permits and associated electrical and plumbing permits issued by the Department of Public Works (DPW) to allow construction of the building improvements and uses on the subject TMK property were addressed or finalized by the DPW-Building Division and other agencies.

5. **Agency Comments and Requirements WH (VAR 01-083).**

- a. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated October 23, 2001 states in part the following:

"TMK(s): 8-7-16-5"

"This is to certify that Spaulding David M (owner of record) has paid all Real Property Taxes due the County of Hawaii up to and including 12/31/01."

- b. The State Department of Health (DOH) memorandum dated December 13, 2001, states:

"The location of the existing cesspool does not meet the required setbacks of the Department of Health, Chapter 62. The Department cannot approve this variance application. If you have any comments regarding this communication, please feel free to call our Wastewater staff in Kona at 322-1507."

- c. The Department of Public Works (DPW) memorandum dated December 13, 2001, states in part:

"We have reviewed the subject application and offer the following comment:

Please refer to the attached Building Division comments dated December 10, 2001.

If you have any questions please contact Kiran Emler of our Kona office at 327-3530."

The attached DPW-Building Division comment state in part:

"Approval of the application shall be conditioned on the comments as noted below."

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP  
Page 4  
May 1, 2002

“The minimum setbacks shall be maintained as follows:  
Residential structures-3 ft. side, 3 ft. rear  
Commercial structures-5 ft. side, 5 ft. rear”

6. **Notice to Surrounding Owners.** Affidavits of mailing a first and second notice(s) submitted by the applicant indicated that first and second notice(s) were mailed on or about November 13, 2001 and December 10, 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 site plan submittal and findings above, portions of the dwelling's water tank and attendant water tank roof or "eave" were constructed into one of the property's 2-side yards and attendant side yard open space on or about 1986. It appears that the portions of the 15 year old water tank encroachments were inadvertently constructed in 1986 beyond the "building line" or outside the building envelope created by applying the minimum building yards of the Zoning Code. Only portions of the water tank and attendant water tank's roof "eave" encroach into the respective side yard. The dwelling and carport improvements comply with the minimum yard and attendant open space requirements of the Zoning Code.

It appears that the water tank and cesspool 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, water tank, and other site improvements. This site plan denotes distances between all building improvements and attendant roof eaves from the affected boundary line(s). The existing building improvements were constructed under a series of building construction permits issued by the DPW starting in 1986. No evidence has been found to show indifference or premeditation by the previous or current owner(s) to deliberately create or intentionally allow the building encroachment problems to occur.

It appears that the existing building improvements were constructed under valid building permits issued to the previous owner(s) nearly 15 years ago. It appears that building inspections of the premises during building construction throughout the life of the building permits did not disclose the water tank building encroachment issues or other setback irregularities.

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP  
Page 5  
May 1, 2002

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 water tank encroachments and attendant roof eaves that encroach into the respective yard(s) and open spaces required by the Zoning Code.
2. Redesign and relocate the entire water tank to fit within the building envelope prescribed by the Zoning Code and other design and remedial building alternatives.
3. Consolidate the subject property (Lot 104) with the adjoining lot (Lot 105) 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 partial or removal of the water tank encroachments 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 water tank encroachments or relocation of dependant building improvements may disrupt the dwelling and water tank's structural integrity 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 the past and/or current owners to deliberately build or intentionally allow the building setback and encroachment problems to be created nearly 15 years ago. The applicant, on behalf of the current owners, submitted the variance request and application to address and resolve the 15 or 16 year old building encroachments and other issues pursuant to the Zoning Code.

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP

Page 6

May 1, 2002

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, carport, and water tank building improvements were constructed under a series of building permits issued by the County in 1986. Only portions of the water tank, a non-habitable structure, encroaches into a side yard and attendant side yard open space. It appears that the building inspections of the premises, during building construction, and throughout the life of the building permits to construct the dwelling, carport, and water tank did not disclose any water tank encroachments into the affected side yard or any other building irregularities. The building permits issued by the DPW-Building Division to construct the dwelling and other necessary building improvements on the subject TMK property were addressed or 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 boundaries and map dated April 9, 1986 was drawn showing denoting the "AS BUILT" building locations and other site improvements for escrow purposes.

The circumstances to allow and permit the water tank encroachments built within that affected side yard and attendant side yard open space requirements nearly 16 years ago are unique.

It appears that the commencement of building activity on the property and building encroachments built into or within that affected side yard between 1986 and 1991 were not perceptible and not physically and visually obtrusive from adjacent TMK property(s) or the rights-of-way. It appears the 15 year old + water tank encroachments do not depreciate or detract from the character of the surrounding neighborhood and the existing and surrounding land patterns. It appears the water tank encroachment(s) within the affected side yards was a contractor or builder's mistake which occurred in 1986 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 building encroachment issues or reveal and disclose any other site encroachment problems. Therefore, it is felt that the existing water tank encroachments within the respective side yard and attendant side yard open space requirements pursuant to the Zoning Code will not detract from

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP  
Page 7  
May 1, 2002

the character of the immediate neighborhood or other surrounding property within the subdivision.

The subject variance application was acknowledged by letter dated December 4, 2001. The applicant's agent agreed to extend the date to May 10, 2002, 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:

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 water tank encroach into the respective side yard and attendant side yard open space required by Chapter 25, the Zoning Code and are identified on a applicant's site plan dated April 9, 1998. The approval of this variance allows the water tank and respective "eave" encroachments within the affected side yard and identified on the applicant's site plan dated April 9, 1998.

The applicant or owner(s) must address and resolve the cesspool encroachment issues with the respective agency(s) and between affected parties. The location and status of the cesspool improvements shall be addressed by the applicant or current owner(s) during escrow or any further change to property title.

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP


Page 8

May 1, 2002

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 104 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

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