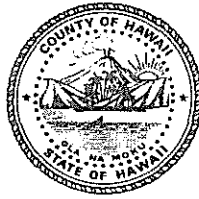


Harry Kim  
Mayor



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

May 1, 2002

Gilbert M. Halpern, Esq.  
465 Haili Street  
Hilo, HI 96720

Dear Mr. Halpern:

**VARIANCE PERMIT NO. 1281 (VAR 01-087)**

**Applicant: GILBERT M. HALPERN, ESQ.**

**Owners: JOSEPH SPRINKEL, ET AL.**

**Request: Variance from Minimum Yards and  
Open Space Requirements,  
Pursuant to Chapter 25, the Zoning Code**

**Tax Map Key: 1-5-051:010, Lot 2372**

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. 1281 allows portions of the dwelling's carport located within a side yard to remain on the property, "AS BUILT", according to applicant's site plan dated July 9, 2001. Portions of the carport encroach a maximum 2.54 feet into a minimum twenty (20) feet side yard and the attendant roof eave encroaches a maximum 2.77 feet into the minimum fourteen (14) feet side yard open space requirement. The variance is the property's minimum yards pursuant to the Zoning Code, Chapter 25, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), and Section 25-4-44, Permitted projections into yards and open spaces.

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**BACKGROUND AND FINDINGS**

1. **Location and Zoning.** The subject property, Lot 2372 containing of 1.00 acres, is within Hawaiian Paradise Park Subdivision, being a portion of Block 7, Land Court Application 1053 (Map 58), and situated at Keaau, Puna, Hawaii.

The subject TMK property is zoned Agricultural (A-1a) and designated Agriculture "A" by the State Land Use Commission.

2. **Application.** The applicant submitted the variance application form, supplemental information, tax clearance, and \$250.00 filing fee check on December 6, 2001.
3. **Site Plan.** The applicant's map or site plan drawing, drawn to scale and dated July 9, 2001 was surveyed and prepared by The Independent Hawaii Surveyors. The site plan denotes and identifies the existing dwelling's carport within the affected side yard, respective side yard open yard spaces. The site plan identifies the building envelope prescribed by the Hawaii County Zoning Code.
4. **Building Permit(s).** According to county records, all DPW building permits (BP No(s). H55749, H56066, H57117, and H57576) issued to allow the building improvements on the subject TMK property were closed by the DPW-Building Division.
5. **Agency Comments and Requirements (VAR 01-087).**

- a. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated December 4, 2001 states in part the following:

"TMK (3): 1-5-051-010-0000."

"This is to certify that DON R JOHNSON (owner-of-record) has paid their real property taxes for the tax period as indicated below. Therefore, there are no taxes owing the County of Hawaii for the above-referenced parcel(s). **Effective till December 31, 2001.**

This Real Property Tax Clearance was requested by JOSEPH/RACHEL SPRINKEL for the County Planning Department use and is issued for this/these parcel(s) only."

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- b. The State Department of Health (DOH) memorandum dated January 2, 2002, states:

"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 January 22, 2002, states:

"We have reviewed the subject application forwarded by your memo dated December 18, 2001 and have no comments or objections to the request."

6. **Notice to Surrounding Owners.** The applicant submitted affidavits and proof of mailing a first notice on December 12, 2001 and second notice on December 28, 2001, respectively. It appears that the applicant mailed the first and second notice(s) on December 12, 2001 and December 28, 2001, respectively.
7. **Comments from Surrounding Property Owners or Public.** No further agency comment were received. A letter dated December 20, 2001, from Leo J. Fredericks, supporting the variance application was received on December 28, 2001.

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

In consideration of the applicant's submittals and findings above, it appears that portions of the existing dwelling's carport was constructed within the minimum 20 feet side yard and attendant minimum 14 feet side yard open space requirements for Lot 2372 according to Chapter 25, the Zoning Code. The 29 year old building encroachments were inadvertently constructed by the previous owner(s) or builders into the affected side yard circa 19973/1974. The applicant's site plan map submittal identifies or denotes the location of the "carport" encroachments constructed beyond the minimum "building line" outside the building envelope which are graphically identified by a series of dashed lines on the variance site plan map. The dwelling and bulk of the carport building improvements located on Lot 2372 are constructed within the building envelope prescribed by the Zoning Code and meet minimum yard(s) and open space requirements.

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It appears that the building encroachment problems were discovered during a recent sale of the subject property. The applicant, on behalf of the current owner(s), submitted a recent survey map dated July 9, 2001 that identifies the location of the 2-story dwelling, garage, water tank, and other site improvements. This site plan denotes distances between portions of the carport/carport eave from the affected side boundary line. Portions of the carport building and attendant roof eaves were constructed into minimum 20 feet side yard and respective 14 feet side yard open spaces required by the Zoning Code. It appears the previous owner(s) and builders were unaware of the building setback problems and encroachment issues. No evidence has been found to show indifference or premeditation by the previous owner(s) or builder 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 owners between 1973 and 1974. 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.

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 applicant or current owners 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 carport encroachments and truncate portions of the carport and attendant roof eaves that encroach into the respective side yard and side yard open space requirements of the Zoning Code.
2. Redesign and relocate the existing carport to fit within the building envelope prescribed by the Zoning Code and other design and remedial building alternatives.
3. Consolidate the subject property (Lot 2372) with the adjoining lot (Lot 2373) 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.

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To require or impose removal of the dwelling/lanai 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 carport's structural integrity and change the building's overall building geometry and exterior character. It appears that the applicant, that the consolidation and subdivision option, pursuant to Chapter 23, Subdivisions, Section 23-7, was not considered.

No evidence has been found to show indifference or premeditation by the applicant or owners/builders 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 these 29 year old building encroachments within one of Lot 2372's side yard and respective side 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 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 other site improvements were constructed under a series of building permits issued by the County between 1973 and 1974. 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 issued by the DPW-Building Division to construct the building improvements on the subject TMK property were closed by the DPW-Building Division together with other associated electrical and mechanical permits issued.

The applicant, on behalf of the current owners are trying to resolve the carport encroachment issues were disclosed after a modern survey of Lot 2372 or subject TMK property to confirm boundary corners and locate existing building improvements was performed and a map of Lot 2372 or the TMK property showing and identifying the existing building improvements, "AS BUILT" was prepared for escrow purposes.

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The circumstances to allow and permit the existing dwelling encroachments to be built within that affected side yard and attendant side yard open space requirements approximately 30 years ago are unique.

It appears that the commencement of building activity and the carport encroachments built into or within that affected side yard in 1973/1974 were not perceptible and not physically and visually obtrusive from adjacent TMK property(s) or the rights-of-way. It appears the 29 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 side yards was a contractor or builder's mistake which occurred in 1973 or 1974 misinterpretation of the minimum building yards or boundary line(s) by the previous owners or builders. Inspection of the TMK property during the life of the building, electrical, and mechanical permits issued between 1973 and 1974 did not discover any dwelling encroachment problems or reveal and disclose any irregular building problems. Therefore, it is felt that the existing carport encroachments within one of Lot 2372's side yards and attendant side yard 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 letter dated December 4, 2001. The applicant's agent agreed to extend the variance decision date to no later than May 3, 2002. 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.

Gilbert M. Halpern, Esq.

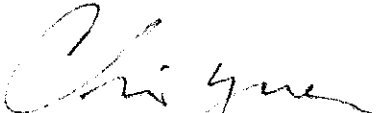
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3. Portions of the existing carport and attendant carport roof eave encroach into a side yard and attendant side yard open space required by Chapter 25, the Zoning Code and are identified on a site plan map dated July 9, 2001 submitted with the variance application. The approval of this variance allows portions of the carport encroachments, AS BUILT" within a side yard and attendant side yard open space to remain on Lot 2372 or subject TMK property.
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 2372 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 - Hilo  
Planning Dept. - Kona