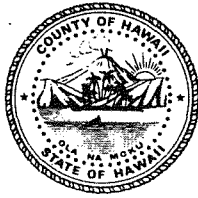


Harry Kim  
Mayor



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

CERTIFIED MAIL

7000 0600 0024 2905 2656

July 17, 2001

Mr. and Mrs. Gabriel Rodrigues  
c/o Mr. Luke Caron  
73-4342 Lihilihi Place  
Kailua-Kona, HI 96740

*144 P...  
to H... 92626*

Dear Mr. and Mrs. Rodrigues:

**VARIANCE PERMIT NO. 1214 WH(VAR 01-010)**

**Applicants: GABRIEL and TERESA RODRIGUES**

**Owners: GABRIEL and TERESA RODRIGUES**

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

**Tax Map Key: 7-3-031:007, Lot 93**

After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No. 1214 allows portions of the existing dwelling, patio, and attendant roof eaves to remain within that affected side yard and open space "AS BUILT" with a minimum 8.4 feet side yard and minimum 4.2 feet open space, in lieu of the minimum 10 feet side yard and 5 feet open space requirements of the Zoning Code, Chapter 25, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), and Section 25-5-77, Other regulations, and Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open spaces, respectively.

006393

*Permitted*  
AUG 06 2001

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c/o Mr. Luke Caron  
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## BACKGROUND AND FINDINGS

1. The subject property containing 10,594 square feet is Lot 93, Kona Palisade Subdivision, Unit 1, F. P. 1061 at Kalaoa 5<sup>th</sup> North Kona, Hawaii.

The property is zoned Agricultural (A-5a) by the County and designated Urban "U" by the Land Use Commission (LUC). It appears that the subject property was subdivided before the Zoning Code, Chapter 25, of the Hawaii County Code was adopted in 1967. The subject property's "pie" shape, average width, and land area are unusual and below the minimum lot requirements for the A-5a zone. The property is deemed a "non-conforming" sized property by the Zoning Code.

2. The applicants submitted a variance application on January 8, 2001. The variance application includes, "SPECIAL AND UNUSUAL CIRCUMSTANCES", dated December 29, 2000, which states in part:

"Building permits were issued for the subject property for a dwelling on 3/14/88 (Permit No. 885211), 4/4/88 (Permit No. M 885286) and 5/25/88 (Permit No. E 885470).

For reasons known only to the contractor and/or the original and previous owner and never disclosed to the buyer prior to or after closure, the foundation/framing were mis-staked when resulted (sic) in a violation of 1.6 feet at the Northeast corner of the dwelling and 0.3 feet at the Northwest corner, thus protruding into the 10 foot side setback. In addition, the eaves at the Northeast corner protrude 0.8 feet into the allowable 5 foot setback allowed.

The violation for which this variance is requested is small and it is not visually perceptible from public view or neighboring lots.

Corrections would be extremely costly and negatively affect the appearance of the dwelling and possibly the adjacent property.

In view of the above, we respectfully request the approval of this petition for variance as the only reasonable available alternative."

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3. The site plan drawing, drawn to scale and dated December 11, 2000, by Kevin McMillen, LPLS, identifies the location of the existing dwelling, patio, eaves, and other site improvements on LOT 93. The site plan identifies the building envelope within dashed lines prescribed by the Zoning Code and denotes distance(s) between the respective dwelling encroachments and the affected side boundary line.

Note: The site plan identifies the location of existing CRM Wall(s) and chain link fencing improvements on the subject TMK property (LOT 93) and other adjacent lots.

Furthermore, the presence of a cesspool or Individual Wastewater System (IWS) located on or within the subject property was not denoted or identified on the site plan submitted by the applicant.

4. A copy of the approved original site plan and detailed building construction plans to construct the existing dwelling and site improvements on the subject TMK property were not submitted or provided with the variance application.

Note: Any free-standing perimeter CRM Walls, chain link fences, CRM retaining walls, less than six (6) feet in height located on and within the subject property do not require any building permit(s) from the DPW. The DPW comments require that the wall and other encroachments denoted within the existing cul-de-sac right-of-way (Lihilihi Place) must be removed by the owner(s) or applicant. The subject variance request does not address other CRM walls, chain link fence, or other boundary encroachments or building permit issues that may arise due to the location of existing walls or fences built on the subject TMK or adjacent TMK property lines, pursuant to the site plan submittal. Encroachment issues within the right-of-way and on the subject TMK property must be resolved between the DPW and the applicant and between respective property owner(s).

5. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated January 8, 2001 stating:

"This is to certify that GABRIEL & TERESA RODRIGUES (Owner-of-record) has paid all real property taxes due the County of Hawaii up to and including June 30, 2001."

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6. The State Department of Health (DOH) memorandum dated February 12, 2001, in the subject variance file states:

"We have no objections to the proposed consolidation and resubdivision application (sic). However, minimum setback requirements for existing wastewater systems needs to be maintained. The existing systems need to be identified on the application map."

7. The Department of Public Works (DPW) memorandum dated February 27, 2001 states in part:

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

1. Any encroachments within the County right-of-way should be removed including trees and shrubbery."

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

8. Proof of mailing a first and second notice was submitted to the Planning Department on January 8, 2001 and February 15, 2001, respectively. For the record, it appears the first and second notice were mailed from Kailua-Kona on January 8, 2001 and February 15, 2001, respectively, by the applicant.

For the record, a letter dated "1/11/2001" was received on January 16, 2001 from John F. Burke Jr. protesting the variance requested and said letter was incorporated into the subject variance file.

#### SPECIAL AND UNUSUAL CIRCUMSTANCES

In view of the above, the encroachment problems on the subject TMK property and within the right-of-way 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. The site plan identifies distance(s) between portions of the dwelling and roof eave encroachment and the affected side boundary line. Portions of the existing dwelling, patio, and the attendant roof eave(s) were constructed and encroach into a side yard. The applicants blame past property owner(s) and their contractor or builder(s) for all existing encroachment problem(s).

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Therefore, considering the background and findings cited above, it is felt there are special or unusual circumstances applying to the subject property which exist either to a degree which deprives the current owner(s) or applicants of substantial property rights that would otherwise be available, or to a degree which obviously interferes with the best use or manner of development of the subject TMK 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. Removal of the existing building encroachments within the affected side yard.
2. Redesign and relocate portions of the existing dwelling to fit within the building envelope prescribed by the Zoning Code and other design and remedial building alternatives.

To require or impose removal of the dwelling or attendant roof eaves constructed by the previous owner(s) or contractor/builder would seem unreasonably harsh and uneconomical at this time. The removal of the building encroachments or relocation of this portion of the dwelling may disrupt the dwelling's structural integrity, internal room circulation, and change the building's overall building geometry and exterior character.

No evidence has been found to show indifference or premeditation by the current owner(s) or applicant to deliberately create or intentionally allow the building's encroachment problems to occur. The applicant submitted the variance application to address and resolve the encroachment problems on behalf of the owner(s). Other wall encroachment and shrubbery problems within the right-of-way or between respective property(s) will be removed and resolved, respectively, by the applicant and respective owner(s).

The Planning Department acknowledges there may be other design or building alternatives available to the applicant 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 and current owner(s) when a more reasonable alternative is available by the granting of the subject variance request.

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### 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. It appears that the existing dwelling was constructed under valid building permit(s) issued to the previous owner(s). It appears that the building inspections of the premises, during building construction and throughout the life of the building permit(s) did not disclose any building encroachments or setback irregularities. The applicants and current owner(s) became aware of the encroachment problems during escrow to buy/sell the subject TMK property. The current owners are trying to resolve building encroachment problems that were disclosed after a modern survey map was presented for escrow purposes.

The circumstances which permitted the existing building improvements to be built on the subject TMK property are unique. The existing building encroachments were built and established within a side yard and minimum open space requirements for this non-conforming sized property before the applicants or owners purchased the subject TMK property.

It appears that existing building encroachments into the affected side yard and open space are not physically and visually obtrusive from adjacent property or rights-of-way. It appears the building encroachments do not depreciate or detract from the character of the surrounding neighborhood, public uses, and the existing and surrounding land patterns. It appears the existing building (dwelling) encroachments within the affected side yard was a building mistake during construction of the dwelling or misinterpretation of the minimum building yards and boundary line(s) by the previous owner(s). Inspection of the property during the life of the building permit(s) issued by the County in 1988 or other agencies did not discover any building encroachment or reveal and disclose any irregular building setback problems. Therefore, it is felt that the existing dwelling encroachments within that side yard not detract from the character of the immediate neighborhood or the subdivision.

The subject variance application was acknowledged by certified letter dated February 6, 2001. Additional time, to allow the Planning Director to understand, address agency comments, and consider other encroachment concerns was required. The applicant agreed to extend the date on which 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.

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### VARIANCE DECISION AND CONDITIONS

This variance request is approved subject to the following conditions:

1. The applicant/owner, 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 will not meet Chapter 25, the Zoning Code's, minimum side yard and open space requirements. The approval of this variance request allows the existing dwelling encroachments identified on the site plan, dated December 11, 2001, to remain on the subject TMK property. The applicant is required to confer with the Department of Public Works (DPW-Building Division) to close any outstanding building permit(s) prior to any future sale or change in property ownership or title.

The existing rock wall encroachments identified on the site plan dated December 11, 2001 and other planting encroachments within Lihilihi Place or the Rights-of-Way shall be removed prior to any future sale or change in property ownership or title. The applicant shall submit proof by way of a letter from the DPW-Engineering Division to the Hawaii County Planning Department on or before October 31, 2001 or prior to any future sale or change in property ownership or change in property title that the rock wall encroachments and other encroachments within the Lihilihi Place Right-of-Way have been removed and that the comment and concerns expressed by February 27, 2001 DPW memorandum have been addressed and satisfied.

4. Future building improvements and permitted uses on the subject TMK property shall be subject to State law and County ordinances and regulations pertaining to building construction and building occupancy.
5. No ohana permit shall be granted to allow an ohana dwelling on the subject TMK property and no building permit(s) shall be issued to allow an ohana dwelling unit or second dwelling unit to be constructed or established on the subject TMK property.

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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  
P:\WP60\WRY\FORMLETT\VARAPPTMK73031007.RODRIQUESKONA

xc: Real Property Tax Office (Kona)  
Kona Office File  
John F. Burke, Jr.