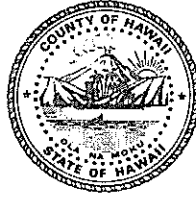


Harry Kim  
Mayor



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

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

Dear Mr. Triantos:

**VARIANCE PERMIT NO. 1282 WH (VAR 02-007)**  
**Applicant: ROBERT D. TRIANTOS, ESQ.**  
**Agent: CARLSMITH BALL LLP**  
**Owners: JOHN WILLIS, ET AL.**  
**Request: Variance from Minimum Yards**  
**Pursuant to Chapter 25, the Zoning Code**  
**Tax Map Key: 7-7-023:017, Lot 11**

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. 1282 allows portions of the dwelling (1-Story House) located with the respective rear yard to remain on the property, "AS BUILT", according to applicant's site plan dated October 9, 2001 (Revised: November 28, 2001). According to this site plan portions of the existing dwelling encroach between 1.2 to 5.2 feet into the rear yard and 16.0 feet into the attendant rear yard open space requirements of the Lot 11's minimum 25 feet rear yard. The variance request is from the Zoning Code, Chapter 25, Article 5, Division 5, Section 25-5-56, Minimum yards, (1), and Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open spaces, (a).

#### **BACKGROUND AND FINDINGS**

1. **Location.** The subject TMK property, Lot 11 containing 21,781 square feet, is within Ohai Mauka Estates, being a portion of R. P. 8289, L. C. Award 7228 to Loe, and situated at Holualoa 4<sup>th</sup>, North Kona, Hawaii.

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2. The subject TMK property is zoned Residential and Agricultural (RA-.5a) and designated Rural "R" 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 February 11, 2002.
4. **Site Plan.** The applicant's map or site plan drawing, drawn to scale and dated October 9, 2001 (Revised: November 28, 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 rear yard and attendant rear yard open space requirements. The site plan identifies (partially) the building envelope prescribed by the Hawaii County Zoning Code.  
**Note:** The site plan does not identify the location of existing cesspool(s) or other wastewater system.
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 WH (VAR 02-007).**
  - a. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated July 7, 2001 states in part the following:  
  
"TMK(s): (3) 7-7-23-17-0002"  
  
"This is to certify that Diane Feeney (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 March 4, 2002, states:  
  
"We have no objections to the proposed variance application. However, minimum setback requirements for existing wastewater systems needs to be maintained."

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP

Page 3

May 1, 2002

- c. The Department of Public Works (DPW) memorandum dated March 9, 2002, states:

“We have reviewed the subject application and offer the following comments:

1. Please refer to the attached Building Division comments dated March 1, 2002.

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

The attached DPW memorandum dated March 1, 2002 states in part the following:

“Our comments on the subject application are as follows;

We oppose the approval of the application for the reasons noted below.

The Plumbing #M006325 permit for the subject dwelling was never finalized.”

6. **Notice to Surrounding Property Owners.** Affidavits of mailing a first and second notice(s) submitted by the applicant indicate that the first and second notice(s) were mailed on or about February 11, 2002 and March 5, 2002, respectively.
7. **Comments from Surrounding Property Owners or Public.** No further comments were received from the agencies.

A letter dated March 14, 2002, signed by William A. Ward, Et al., (TMK: 7-7-023-004, Lot 1-D) objecting to the variance application was received on March 18, 2002.

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

### **SPECIAL AND UNUSUAL CIRCUMSTANCES**

In consideration of the applicant's submittals and findings above, it appears that small portions of the "1-Story House" or dwelling was recently constructed within the rear yard(s) of Lot 11 pursuant to Chapter 25, the Zoning Code. It appears that small portions of the dwelling and the attendant roof eave were inadvertently constructed beyond the "building line" 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 owner(s) for 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 11's boundary lines. Portions of the dwelling were constructed within the minimum 25 feet rear yard. It appears that the current owners or builder were not aware of these small building encroachments into the affected rear yard. 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 dwelling(s) and other site improvements were constructed under a series of building permit(s) and associated construction permits issued by the DPW. 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.

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 portions of the dwelling encroachments and modify attendant roof eaves that encroach into the respective side yard(s) required by the Zoning Code.

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

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 Lot 11 with the adjacent lot 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'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 rear yard(s) prescribed by 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 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 permits issued by the DPW-Building Division to construct the dwellings on the subject TMK property were closed by the DPW-Building Division together with other associated construction permits; except a plumbing permit cited by the DPW. The applicant and current owners are trying to address and resolve building encroachment problems or issues that were disclosed after a modern

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP

Page 6

May 1, 2002

survey of the existing TMK property/premises was performed and the "VARIANCE EXHIBIT" map of the TMK property identifying the building locations, "AS BUILT", was prepared for the variance application or escrow.

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

It appears that the commencement of building activity and the dwelling encroachments built into or within that affected rear yard were not perceptible and not physically and visually obtrusive from the rights-of-way or adjoining property(s). 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 rear yard was a contractor or builder's mistake which occurred or a misinterpretation of the "irregular" rear boundary line, which consists of a series of azimuths, 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 position problems. Therefore, it is felt that the existing dwelling encroachments within Lot 11's respective rear yard(s) and attendant rear yard open spaces required by the Zoning Code will not detract from the character of the immediate neighborhood or other nearby property(s) within the subdivision.

The subject variance application was acknowledged by letter dated February 22, 2002. The applicant's agent agreed to extend the date to May 12, 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.

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP

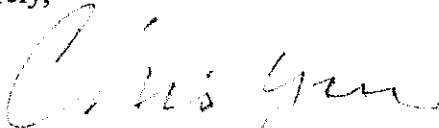
Page 7

May 1, 2002

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 a "1-Story House" encroach into the respective rear yard 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 portions of the dwelling or portions of the 1-Story House encroachments identified and denoted on the applicant's site plan dated October 9, 2001 (Revised: November 28, 2001), to remain, "AS BUILT", on Lot 11 or the subject TMK property.
4. Future building improvements and permitted uses on Lot 11 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  
TMK File