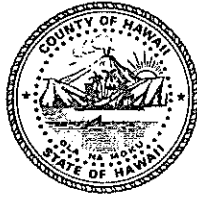


Harry Kim  
Mayor



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 22, 2001

FIRST TITLE CORPORATION  
75-5722 Kuakini Highway  
Kailua-Kona, HI 96740

Gentlemen:

**VARIANCE PERMIT NO. 1284 WH (VAR 02-012)**  
**Applicant: ADELINE GORDON**  
**Owner: ADELINE GORDON**  
**Request: Variance from Minimum Yards and**  
**Open Space Requirements**  
**Pursuant to Chapter 25, the Zoning Code**  
**Tax Map Key: 7-3-025:015, Lot 170**

After reviewing the applicant's application and the information submitted, the Planning Director certifies the approval of the variance request subject to conditions stated herein. Variance Permit No.1284 allows the dwelling and house eave encroachments, "AS BUILT", to remain within the affected rear yard with a minimum 13.85 feet rear yard and minimum 9.14 feet rear yard open space according to the variance site plan map dated February 27, 2002, in lieu of the minimum 20 feet rear yard and minimum 14 feet rear yard open space requirements of the Zoning Code. The variance request is from the Zoning Code, Chapter 25, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), Section 25-5-77, Other regulations, and Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open spaces, (a).

### BACKGROUND AND FINDINGS

1. **Location.** The subject property, Lot 170 containing 10,102 square feet, within the Kona Palisade Subdivision, Unit 1, File Plan 1061, and is situated at Kalaoa 5<sup>th</sup>, North Kona, Hawaii.

019061

MAY 23 2002

FIRST TITLE CORPORATION

Page 2

May 22, 2002

2. The subject TMK property is zoned Agricultural (A-5a) and designated Urban "U" by the State Land Use Commission.
3. **Application.** The applicant submitted the variance application, variance submittals, and \$250.00 filing fee check on March 8, 2002.
4. **Site Plan.** The applicant's map or site plan drawing, drawn to scale and dated February 27, 2002 was surveyed and prepared by Don Macintosh Consulting. This map identifies the dwelling encroachment area (42 square feet) within the Lot 170's rear yard and denotes the distance between the dwelling eave and the rear boundary line. The map identifies the building line and building envelope prescribed by the Hawaii County Zoning Code.

The garage was permitted and constructed before certain provisions and requirements of the Zoning Code were changed in 1996 and ratified on April 6, 1999. Therefore, portions of the garage and the garage's building position are "non-conforming" with respect to the current Zoning Code.

**Note:** The applicant's site plan does not identify or denote the cesspool or Independent Wastewater System (IWS) location.

5. **Building Permit(s).** County records indicate all building permits and associated construction permits issued to the subject TMK property by the Department of Public Works (DPW)-Building Division were closed.
6. **Agency Comments and Requirements.**
  - a. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated March 5, 2002 states in part the following:

"TMK(s) 3/7-3-032-015"

"This is to certify that Donald B & Adeline L. Gordon (owner of record) has paid all Real Property Taxes due the County of Hawaii up to and including June 30, 2002."
  - b. The State Department of Health (DOH) memorandum dated March 22, 2002, in the subject variance file states in part:

"We have no objections to the proposed variance application. However, minimum setback requirements for existing wastewater systems needs to be maintained.

FIRST TITLE CORPORATION

Page 3

May 22, 2002

- c. The DPW memorandum dated March 27, 2002, states in part:

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

We have reviewed the subject application and have no comments.

1. Please refer to the attached Building Division comments dated March 19, 2002.

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

The attached DPW-Building Division memorandum date March 19, 2002 states in part the following:

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

The Building #896428, #935754 and Electrical EK06775 permits were never finalized.”

**Note:** All building permits and related construction permits issued to the subject TMK property were “closed” by the DPW.

6. **Notice to Surrounding Property Owners.** The applicant submitted a letter (second notice) dated April 16, 2002 together with certificates of mailing dated April 16, 2002. It appears that the notice(s) were mailed on March 8, 2002 and April 16, 2002, respectively.
7. **Comments from Surrounding Property Owners or Public.** No further agency comments or objections to the subject application were received.

#### SPECIAL AND UNUSUAL CIRCUMSTANCES

In consideration of the applicant’s submittals and findings above, it appears that portions of the dwelling (42 square feet) and attendant roof eave were inadvertently constructed 10.86 feet and 0.15 feet, respectively, into the property’s minimum 20 feet rear yard and minimum 14 feet rear yard open space required by the Zoning Code. The bulk of the 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.

FIRST TITLE CORPORATION

Page 4

May 22, 2002

A building permit to construct the existing garage (accessory building) was issued to permit the garage location prior to changes of the Zoning Code. The garage location complied with the minimum building yards at the time the building permit was issued and constructed.

The encroachment issues were discovered after the applicant decided to sell the property due to personal circumstances. During the sale of the property a map showing the buildings, "AS BUILT", disclosed the building encroachment issues. No evidence has been found to show indifference or premeditation by the applicant or builders to deliberately create or intentionally allow or create the encroachment problems.

It appears that the existing dwelling and garage were constructed under valid building permits and other 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 permits did not disclose any building encroachments or setback irregularities. County records indicate all building permits and construction permits were closed by the DPW.

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 dwelling encroachment and modify attendant roof eaves that encroach into the respective rear yard, pursuant to the Zoning Code.
2. Redesign and relocate the dwelling improvements to fit within the building envelope prescribed by the Zoning Code or other 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 boundary lines to meet minimum yards and attendant open space requirements.

FIRST TITLE CORPORATION

Page 5

May 22, 2002

To require or impose removal of the existing 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. It appears that the consolidation and subdivision option, pursuant to Chapter 23, Subdivisions, Section 23-7, was not an option or considered.

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

#### **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 42 square feet dwelling encroachment within the rear yards are not perceptible and physically and visually obtrusive from adjacent TMK property(s) or the immediate right-of-way. The dwelling encroachments do not depreciate or detract from the character of the surrounding neighborhood and existing and surrounding land patterns. The dwelling encroachment within the affected rear 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 issued to the property 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 respective rear yard and attendant rear 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 variance request and application was acknowledged by letter dated March 8, 2002. The applicant agreed to extend the decision date to May 24, 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.

FIRST TITLE CORPORATION

Page 6

May 22, 2002

**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 dwelling encroach into the rear yard and rear yard open space requirements pursuant to Chapter 25, the Zoning Code and are identified on a site plan submitted with the variance application dated February 27, 2002. The approval of this variance allows the dwelling, dwelling encroachment, and garage to remain, "AS BUILT", on the subject TMK property according to the variance site plan map dated February 27, 2002.

No permit shall be granted to allow an ohana dwelling or building permit issued to allow construction of an "ohana" dwelling on Lot 170 shall be granted, subject to provisions of the Zoning Code or State Law which may change from time to time.

4. Future building additions, improvements, and repairs to the dwelling or garage and permitted uses on Lot 170 or the subject TMK property shall be subject to State law and County ordinances and regulations pertaining to building construction and building occupancy.

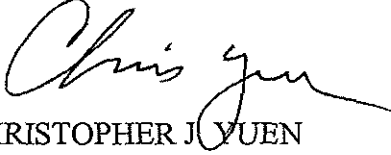
FIRST TITLE CORPORATION

Page 7

May 22, 2002

Should any of the foregoing conditions not be complied with, the Planning Director may proceed to declare this Variance Permit null and void.

Sincerely,

A handwritten signature in cursive script that reads "Chris Yuen".

CHRISTOPHER J. YUEN  
Planning Director

WRY/RRT:cps

P:\WP60\WRY\FORMLETT\VARAPPZCTMK73032015.GORDON

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