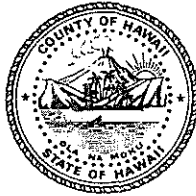


Harry Kim
Mayor



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

July 16, 2002

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

Dear Mr. Triantos:

VARIANCE PERMIT NO. 1294 WH (VAR 02-021)
Applicant: ROBERT D. TRIANTOS, ESQ.
Agent: CARLSMITH BALL LLP
Owner: IRENE BEATRICE HORVATH, ET AL.
Request: Variance from Minimum Yards
Pursuant to Chapter 25, the Zoning Code
Tax Map Key: 7-3-022:015, Lot 8

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. 1294 allows portions of the carport/storage building attached to the dwelling to remain, "AS BUILT", according to applicant's site plan map dated and signed on March 29, 2002, with a minimum 17.7 feet to 18.6 feet front yard and 8.9 feet to 9.7 feet side yard, in lieu of the minimum 20 feet front and 10 feet side yards requirement, respectively. The variance request is from Lot 8's minimum front and side yard requirements, pursuant to the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), and Section 25-5-77, Other regulations.

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BACKGROUND AND FINDINGS

1. **Location.** The subject TMK property, Lot 8 containing of 19, 059 square feet, is within Kona Coastview Subdivision, Unit II and Unit III, File Plan 915, and situated at Kalaoa 3rd, North Kona, Hawaii.
2. The subject TMK property is zoned Agriculture (A-5a) and designated Urban "U" by the State Land Use Commission.
3. **Application.** The applicant or agent submitted the variance application form, supplemental information, tax clearance, and \$250.00 filing fee check to the Kona Planning Department on May 6, 2002.
4. **Site Plan.** The variance site plan map, drawn to scale and dated March 29, 2002 was surveyed and prepared by KKM Surveys. The site plan identifies the building envelope prescribed within Lot 8 by applying the minimum yards pursuant to Hawaii County Zoning Code. The site plan map denotes and identifies the dwelling encroachments within the affected minimum front and side yards.
Note: The site plan does not identify the location of existing cesspool(s) or other wastewater system.
5. **Building Permit(s).** County records indicate that building permits to construct the dwelling, carport, storage, concrete driveway, and other building improvements located on the subject TMK property were issued by the DPW-Building Division.
Note: According to the applicant's background, the unpermitted storage "Shed" building containing approximately 160 square feet, will be demolished or removed from Lot 8. (Refer to Variance Conditions below).
6. **Agency Comments and Requirements WH (VAR 02-021).**
 - a. The Department of Health (DOH) memorandum dated May 6, 2002, states:

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

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- b. The Department of Public Works (DPW) memorandum dated May 14, 2002 states:

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

Any encroachments within the County right-of-way should be removed.

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

7. **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 April 19, 2002 and May 7, 2002, respectively.
8. **Comments from Surrounding Property Owners or Public.** No further comments were received from the agencies. On or about May 28, 2002, staff discussed the applicant’s variance request and other issues with an adjoining property owner(s)-Mrs. Ahn (TMK: (3) 7-3-022:014, Lot 7). No oral or written objections to the variance request or subject variance application were received from the surrounding property owners or public.

SPECIAL AND UNUSUAL CIRCUMSTANCES

In consideration of the applicant’s submittals and findings above, it appears that small portions of the “Carport-Storage” attached to the dwelling were constructed within the front and a side yard. A small portion of the carport and storage building improvements were inadvertently constructed beyond the “building line” outside the building envelope defined by the minimum yards of the Zoning Code. The bulk of the remaining dwelling improvements and entire living areas are within the building envelope prescribed by the Zoning Code.

The small encroachments within the affected yards were discovered after a recent survey map was prepared for the owners or escrow purposes. The recent survey map or variance site plan map identifies and denotes distances between dwelling’s carport and storage building improvements and the affected boundary lines. No evidence has been found to show indifference or premeditation by the applicant or current owners to deliberately create or intentionally allow the building encroachment issues to occur.

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It appears that the dwelling and other site improvements were constructed under a valid building permits 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 owners. Alternatives available to the current owners or applicant to address and correct the existing dwelling encroachments include the following actions:

1. Remove portions of the dwelling the carport/storage building encroachments and modify attendant roof eaves that encroach into the respective yard(s) required by the Zoning Code.
2. Redesign and relocate the existing building 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 8 with adjoining lot (Lot 7) and resubdivide the property back into like areas and shift or adjust affected yards accordingly to meet minimum building lines and minimum yard and open space requirements.

To require or impose removal of these small building encroachments and modifying the attendant roof eave(s) to meet minimum 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, 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.

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No evidence has been found to show indifference or premeditation by the applicant or owner(s) 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 and issues within the affected 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 series of building permits 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 applicant and current owners are trying to address and resolve building encroachment issues that were disclosed after a modern survey of the existing TMK property/premises was performed and a site plan map of the TMK property identifying the dwelling and other site improvements, "AS BUILT", was prepared for the variance application or escrow.

The circumstances to allow and permit the existing building encroachments to be built within the affected yards and open space requirements are unique.

It appears that the commencement of building activity and the building encroachments built into or within that affected yards were not perceptible and not physically and visually obtrusive from the rights-of-way or adjoining property(s). It appears that 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 that the existing encroachment(s) within the affected yards was a contractor or builder's mistake. Inspection of the TMK property during the life of the building, electrical, and mechanical permits did not discover any dwelling or carport/storage building encroachment problems or reveal and disclose any irregular building position problems. Therefore, it is felt that the existing building encroachments within the affected front and side yards of Lot 8, pursuant to the Zoning Code, will not detract from the character of the immediate neighborhood or other nearby property(s) within the subdivision.

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The variance request and application was acknowledged by letter dated May 1, 2002. The applicant agreed to extend the decision date to July 26, 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.
3. Portions of the dwelling's attached "Carport-Storage" and attendant roof "Eave" encroach into the front and side yards pursuant to Chapter 25, the Zoning Code, and are identified on a site plan map submitted with the variance application. The approval of this variance allows these building encroachments identified and denoted on the applicant's site plan map, signed and dated March 29, 2002, to remain, "AS BUILT", on Lot 8 or the subject TMK property.
4. The unpermitted "Shed", containing approximately 160 square feet and located 8.1 feet to 8.4 feet from a side boundary line pursuant to the variance site plan map dated March 29, 2002 will be demolished and removed on or before August 31, 2002 or prior to any change in property title or sale of the property.
5. The applicant or current owners shall confer with the Department of Public Works (DPW) and remove "Wall" and "Planter" encroachments within Ahikawa Street (County Right-of-Way).

Robert D. Triantos, Esq.
CARLSMITH BALL LLP

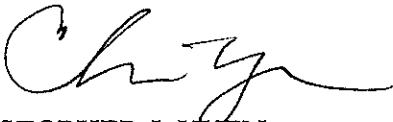
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6. No permit to allow an ohana dwelling or building permit issued to construct an "ohana" dwelling shall be granted to Lot 8 or the subject TMK property, subject to provisions of the Zoning Code or State Law, which may change from time to time.
7. Future building improvements and permitted uses on Lot 8 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