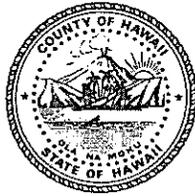


Harry Kim  
Mayor



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. 1295 WH (VAR 02-027)  
Applicant: ROBERT D. TRIANTOS, ESQ.  
Agent: CARLSMITH BALL LLP  
Owner: THOMAS G. MCHALE, ET AL.  
Request: Variance from Minimum Yards  
Pursuant to Chapter 25, the Zoning Code  
Tax Map Key: 7-6-023:046, Lot 88

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. 1295 allows portions of a dwelling to remain, "AS BUILT", according to applicant's site plan map dated January 11, 2002. The variance allows the dwelling to remain with a minimum 9.2 feet to 9.8 feet side yard, in lieu of the minimum 10 feet side yard requirement. The variance request is from Lot 88's minimum side yard requirement(s), pursuant to the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 1, Section 25-5-7, Minimum yards, (a) (2) (B).

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## **BACKGROUND AND FINDINGS**

1. **Location.** The subject TMK property, Lot 88 containing of 10, 909 square feet, is within Komohana Kai, Unit I, being a portion of Royal Patent 4475, Land Commission Award 7713, Apana 43 to V. Kamamalu, at Holualoa 1<sup>st</sup> and 2<sup>nd</sup>, North Kona, Hawaii.
2. The subject TMK property is zoned Single-Family Residential (RS-10) and designated Urban "U" by the State Land Use Commission. The property is within the Special Management Area (SMA).
3. **Application.** The applicant or agent submitted the variance application form, supplemental information, tax clearance, and \$250.00 filing fee check on May 6, 2002.
4. **Site Plan.** The variance site plan map, drawn to scale and dated January 11, 2002 was surveyed and prepared by Wes Thomas Associates. The site plan identifies the building envelope prescribed within Lot 88 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 10 feet side yard.  
**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, concrete driveway and other building improvements located on the subject TMK property were issued by the DPW-Building Division.
6. **Agency Comments and Requirements WH (VAR 02-027).**
  - a. Pursuant to Department of Health (DOH) memorandum dated May 22, 2002 and subsequent telephone conversations with DOH staff on June 6, 2002, the DOH comments for the subject TMK will be as follows:  
  
"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 June 10, 2002 states:

“We have reviewed the subject application and have no comments.

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 May 6, 2002 and May 23, 2002, respectively.
8. **Comments from Surrounding Property Owners or Public.** No further comments were received from the agencies. No written objections to the 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 dwelling were constructed within a side yard of Lot 88. This small portion or sliver of the dwelling's living area was inadvertently constructed beyond the “building line” outside the building envelope defined by the minimum yards of the Zoning Code. The remaining bulk of the dwelling and living areas are within the building envelope prescribed by the Zoning Code.

It appears that the small building encroachment within the affected side yard was discovered after a recent survey map was prepared for the owner or escrow purposes. The recent survey map or variance site plan map identifies and denotes distances between dwelling and the affected boundary lines. It appears that the current owner or builders were not aware of the building encroachment issues. No evidence has been found to show indifference or premeditation by the owner or builders to deliberately create or intentionally allow the building encroachment issues to occur.

It appears that the dwelling and other site improvements were constructed under a valid building permit 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.

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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 encroachment 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 88 with adjoining lot (Lot 83) 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 the dwelling 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 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 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.

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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 applicant and current owners are trying to address and resolve building encroachment problems or issues that were disclosed after a modern survey of the existing TMK property/premises was performed and the variance application 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 that affected side yard 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 Lot 88's respective yard(s) required by the Zoning Code will not detract from the character of the immediate neighborhood or other nearby property(s) within the subdivision.

The variance request and application was acknowledged by letter dated May 15, 2002. The applicant agreed to extend the decision date to July 26, 2002.

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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**

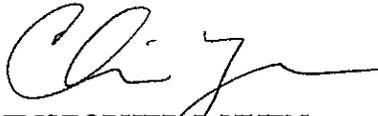
The variance request is approved subject to the following conditions:

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 encroach into a side yard 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 January 11, 2002, to remain, "AS BUILT", on Lot 88 or the subject TMK property.
4. No permit to allow an ohana dwelling or building permit issued to construct an "ohana" dwelling shall be granted to Lot 88 or the subject TMK property, subject to provisions of the Zoning Code or State Law, which may change from time to time.
5. Future building improvements and permitted uses on Lot 88 or the subject TMK property shall be subject to State law and County ordinances and regulations pertaining to building construction and building occupancy.

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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  
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xc: Real Property Tax - Kona  
Planning Dept.- Kona File