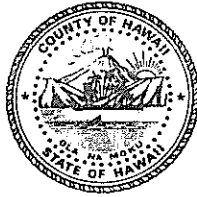


Harry Kim
Mayor



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

September 19, 2002

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

Dear Mr. Triantos:

VARIANCE PERMIT NO. 1311 WH (VAR 02-043)

**Applicant: ROBERT D. TRIANTOS, ESQ./
CARLSMITH BALL LLP**

Owners: BRIAN J. ACKER, ET AL.

**Request: Variance from Minimum Yards,
Chapter 25, the Zoning Code**

Tax Map Key: 7-3-040:076, Lot 154

After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No.1311 allows portions of the dwelling to remain on Lot 154, "AS BUILT", with a 9.57 feet to 9.81 feet side yard according to the variance application's site plan map dated and certified on October 22, 1998. The variance request is from the minimum 10 feet side yard requirements, pursuant to the Hawaii County Zoning Code, Chapter 25, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), and Section 25-5-77, Other regulations.

BACKGROUND AND FINDINGS

1. **Location.** The subject property, Lot 154 containing 12,054 square feet, is within Kona Palisade Subdivision, Unit 3, File Plan 1146, and situated at Kalaoa 5th, North Kona, Hawaii.

The property is zoned Agricultural (A-5a) by the County and designated Urban "U" by the Land Use Commission (LUC).

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2. **Variance Application-Site Plan**. The applicant submitted the variance application, attachments, and filing fee to the Kona Planning Department on June 24, 2002. The applicant's variance application site plan or survey map drawing is drawn to scale and dated and certified on October 22, 1998. This survey map or variance site plan map prepared by Don McIntosh Consulting shows the dwelling position, roof eaves, and other site improvements on "LOT 154", pursuant to an actual survey done on or about October 20, 1998.

Note: The survey map does not denote the cesspool or septic system location and any other wall or landscaping improvements along or straddling the lot's boundary lines. Any walls or site improvements straddling common boundary lines or any other boundary encroachments must be addressed and resolved by the applicant or between affected parties or between legal property owner(s).

3. **Agency Comments and Requirements-WH (VAR 02-043):**

- a. The State Department of Health (DOH) memorandum dated August 1, 2002, states:

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

- b. The Department of Public Works (DPW) memorandum dated August 9, 2002, states in part:

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

4. **Notice to Surrounding Property Owners**. Proof of mailing a first and second notice was submitted to the Planning Department. For the record, it appears that the first and second notice was mailed on or about June 24, 2002 and July 29, 2002, respectively, by the applicant.
5. **Comments from Surrounding Property Owners or Public**. No further written agency comments were received and no objections from the surrounding property owners or public were received.

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SPECIAL AND UNUSUAL CIRCUMSTANCES

It appears that the building encroachment problems were discovered during escrow or sale of the subject property. The applicant, on behalf of the owners, is trying to resolve building encroachment issues created by previous owner(s) or builders. The variance application's site plan map was prepared by a surveyor and shows the dwelling position and other site improvements, "AS BUILT", on Lot 154. This site plan shows that portions of a dwelling was constructed beyond the lot's building envelope into one of Lot 154's side yard required by the Hawaii County Zoning Code. The applicant or current owners became aware of the encroachment issues after the survey map was prepared and presented during escrow. No evidence has been found to show indifference or premeditation by the current owners or builders to deliberately create or intentionally allow the building encroachment problems to occur. It appears that the dwelling improvements were constructed under valid building permits and other construction permits issued by the County. It appears that building inspections of the premises by the agencies during construction of the dwelling improvements did not disclose any building encroachment issues or building setback irregularities.

ALTERNATIVES

Alternatives available to the applicant to address and correct the existing building encroachments include the following actions:

1. Removing the existing building encroachments or redesigning or relocating the dwelling to fit within the correct building envelope prescribed by the Zoning Code.
2. Consolidate the Lot 154 with the adjoining lot (Lot 153) and resubdivide the resultant lot to modify the common side boundary line and adjustment of minimum yards.

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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)/uses and boundary/property lines.

It appears that existing building encroachments into one of the side yards are not physically noticeable or visually obtrusive from adjacent property(s) or the existing 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. Therefore, it is felt that these building encroachments within the affected side yard will not detract from the character of the immediate neighborhood or the subdivision.

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.

PLANNING DIRECTOR'S DECISION AND VARIANCE CONDITIONS

This 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.

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3. Portions of the dwelling constructed on Lot 154 encroaches into a minimum 10 feet side yard, pursuant to the Hawaii County Code, Chapter 25, Zoning. The approval of this variance allows the dwelling improvements and encroachments identified on the variance application's site plan map dated and certified October 22, 1998, to remain, "AS BUILT", on Lot 154 or subject TMK property.
4. No permit shall be granted to allow an ohana dwelling or building permit issued to allow construction of an "ohana" dwelling shall be granted to Lot 154 or 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 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

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