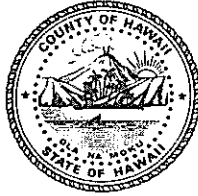


Harry Kim  
Mayor



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

November 6, 2002

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

Dear Mr. Triantos:

**VARIANCE PERMIT NO. 1335 WH (VAR 02-062)**

**Applicant: ROBERT D. TRIANTOS, ESQ.**  
**Agent: CARLSMITH BALL LLP**  
**Owner: DANIEL DARREN MARCIL**  
**Request: Variance from Minimum Yards**  
**Pursuant to Chapter 25, the Zoning Code**  
**Tax Map Key: 7-7-009:037, Lot 37**

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. 1335 allows portions of the carport-storage building improvements located within the respective yards to remain on the property, "AS BUILT", according to variance site plan or survey map that is signed and dated June 10, 2002. The variance request is from Lot 37's minimum yard requirements, pursuant to the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 1, Section 25-5-7, Minimum yards, (a) (2) (A) (B) and Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open space requirements, (a).

#### BACKGROUND AND FINDINGS

1. **Location.** The subject TMK property, Lot 37 containing 10,396 square feet, is within the Sunset View Terrace Subdivision, Unit I, and situated at Holualoa 4<sup>th</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.

NOV 11 8 2002

028446

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP  
Page 2  
November 6, 2002

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 or about August 13, 2002.
4. **Site Plan.** The variance site plan map was prepared by KKM Surveys. The survey map is signed by a surveyor and dated June 10, 2002. The map identifies Lot 37's building lines pursuant to Hawaii County Zoning Code. The site plan map denotes and identifies the building encroachments within the minimum yards.

**Note:** The site plan does not identify the location of existing cesspool(s) or other wastewater system. The variance request does not address the location of the wastewater system, the shed located on the adjoining property (LOT 35) and shed encroachments on the subject property, rock walls along or straddling common boundary lines, and any landscape encroachment issues.

5. **Building Permit(s).** Pursuant to the applicant's background report, it appears that building permits to construct the dwelling improvements located on the subject TMK property were issued by the DPW-Building Division.
6. **Agency Comments and Requirements WH (VAR 02-062).**
  - a. State Department of Health (DOH) memorandum dated September 5, 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 September 13, 2002, states in part:

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

Please refer to the attached Building Division comments dated September 12, 2002.

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP  
Page 3  
November 6, 2002

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

The attached DPW memorandum dated “, 2002” (sic) states in part the following:

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

The Electrical # EK03586 permit for the subject dwelling-filed no status of inspections.”

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 August 13, 2002 and September 4, 2002, respectively.
8. **Comments from Surrounding Property Owners or Public.** No further comments were received from the agencies. No objections to the variance application were received from the surrounding property owners and public.

#### **SPECIAL AND UNUSUAL CIRCUMSTANCES**

In consideration of the applicant’s submittals and findings above, it appears that small portions of the dwelling improvements were recently constructed within minimum yard(s) of Lot 37 pursuant to Chapter 25, the Zoning Code. Small portions of the carport-storage building improvements encroach into the minimum front and side yards of the Zoning Code. The dwelling’s living area and carport (parking spaces) 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 escrow purposes or the current owner. The recent survey map or variance site plan map identifies and denotes the distance between portions of the carport-storage building improvement from Lot 37’s front and side boundary lines. Portions of the carport-storage building improvements encroach into the minimum yard requirements. No evidence has been found to show indifference or premeditation by the current 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 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

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP  
Page 4  
November 6, 2002

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 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 37 with the road right-of-way and resubdivide the property back into like areas and shift or adjust affected boundary lines and yards accordingly to comport with the minimum yard requirements of the Zoning Code.

To require or impose removal of the building encroachments and modifying the attendant roof eave(s) to meet minimum yard requirements would seem unreasonably harsh and uneconomical at this time. The consolidation and subdivision option with the public right-of-way fronting the property, pursuant to Chapter 23, Subdivisions, Section 23-7, would not be a viable option in this case.

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

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP  
Page 5  
November 6, 2002

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 owner is addressing and trying to resolve building encroachment problems or issues that were disclosed after a modern survey of the existing TMK property/premises was performed and the survey map of the TMK property identifying the dwelling and carport-storage improvements, "AS BUILT", was presented for escrow purposes and submitted with the variance application.

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

It appears that the building encroachments built into or within that affected front and side yards and minimum open yard requirements were not perceptible and not physically and visually obtrusive from the right-of-way or adjoining property(s). It appears that these recent and small building encroachments do not depreciate or detract from the character of the surrounding neighborhood and the existing and surrounding land patterns. It appears the building 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 encroachment issues or reveal and disclose any irregular building position problems. Therefore, it is felt that the existing dwelling encroachments within Lot 37'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 subject variance application was acknowledged by letter dated August 29, 2002 and additional time to consider the agency comments and other encroachment issues was deemed necessary. The applicant agreed to extend the date on which the Planning Director shall render a decision on the subject variance to no later than November 15, 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

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP  
Page 6  
November 6, 2002

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**

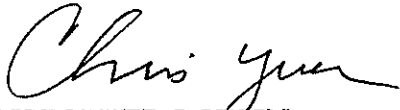
The variance request is approved subject to the following conditions:

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 a dwelling's carport-storage building improvements encroach into the respective yards 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 the carport-storage encroachments, to remain, "AS BUILT", on Lot 37 or the subject TMK property.
4. The outstanding electrical permit-#EK03586 shall be "finaled" or closed by the Department of Public Works (DPW)-Building Division prior to any further change in title or sale of the property.
5. Future building improvements and permitted uses on Lot 37 or the subject TMK property shall be subject to State law and County ordinances and regulations pertaining to building construction and building occupancy.

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP  
Page 7  
November 6, 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,



CHRISTOPHER J. YUEN  
Planning Director

WRY:pak  
PAWP60\WRY\FORMLETT\VARAPPZCTMK77009037.RDTESQ

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