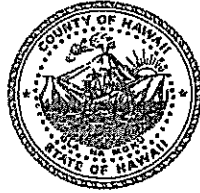


Harry Kim
Mayor



Christopher J. Yuen
Director

Roy R. Takemoto
Deputy Director

County of Hawaii

PLANNING DEPARTMENT

101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720-3043
(808) 961-8288 • Fax (808) 961-8742

July 30, 2002

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

Dear Mr. Triantos:

VARIANCE PERMIT NO. 1377 WH (VAR 03-024)

Applicant: ROBERT D. TRIANTOS, ESQ.
Agent: CARLSMITH BALL LLP
Owner: THOMAS DAWSON, ET AL.
Request: Variance from Minimum Yards
Pursuant to Chapter 25, the Zoning Code
Tax Map Key: 7-6-023:060, Lot 102

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. 1377 allows portions of a dwelling to remain, "AS BUILT", according to applicant's site plan map dated and signed on February 21, 2003. The variance allows portions of the dwelling to remain with a minimum 4.0 feet to 4.2 feet side yard open space, in lieu of the minimum 5 feet side yard open space requirement. The variance request is from Lot 102's minimum yard requirement, pursuant to the Hawaii County Code, Chapter 25, Zoning, 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 102 containing of 10,001 square feet, is within Komohana Kai, Unit I, and situated at Holualoa 1st and 2nd, 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).

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3. **Application.** The applicant or agent submitted the variance application form, supplemental information, tax clearance, and \$250.00 filing fee check on or about April 3, 2003 to the Planning Department (Kona Office).

4. **Site Plan.** The variance site plan map or "SURVEY MAP OF LOT 102" is drawn to scale and was signed and dated on February 21, 2003. The site plan map identifies the building line and building envelope within Lot 102 by applying the minimum yards pursuant to Hawaii County Zoning Code. The site plan map denotes the distance between dwelling's eave and a side yard boundary line. Portions of the dwelling's "Eave" will not comply with the minimum 5 feet side yard open space requirement.

Note: The site plan does not identify the location of existing cesspool(s) or other wastewater system. Portions of a "Wall" straddle common boundary lines. The variance request does not address the location any wastewater system or wall encroachment issues.

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 03-024).**

a. The Department of Public Works (DPW) memorandum dated May 27, 2003 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."

Note: Another DPW memorandum dated May 22, 2003 states in part:
"We have no comments or objections to the application."

b. The Department of Health (DOH) memorandum dated June 16, 2003 states:

"The Health Department found no environmental health concerns with regulatory implications in the submittals."

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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 3, 2003 and May 22, 2003, 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 a small portion the dwelling "eave" were constructed into the minimum open yard requirements of Lot 102. This small portion or sliver of the dwelling's "Eave" was inadvertently constructed into attendant open yard space pursuant to the limits defined by the minimum open yard requirements of the Zoning Code.

This small building encroachment within the affected side open space was discovered after a recent survey map was prepared for current owners 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 builders or owners were not aware of the building encroachment issues. No evidence has been found to show indifference or premeditation by the owners 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.

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

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the existing dwelling encroachments include the following actions:

1. Remove portions of the dwelling "Eave" encroachment and modify attendant roof eaves that encroach into the respective side yard(s) to meet the minimum yards of 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 102 with adjoining lot (Lot 101) and resubdivide the property back into like areas and shift or adjust affected yards accordingly to meet minimum building lines and minimum side yard and attendant open space requirements.

To require or impose removal of the dwelling or "Eave" encroachments and modifying the dwelling's roof position 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 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.

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,

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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 roof encroachments do not depreciate or detract from the character of the surrounding neighborhood and the existing and surrounding land patterns. It appears that the 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 problems or reveal and disclose any irregular building position problems. Therefore, it is felt that the existing building encroachments within Lot 102's the respective open side yard 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 12, 2003. The applicant agreed to extend the decision date to July 31, 2003.

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.

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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 "Eave" encroach into a side yard open space 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 February 21, 2003, to remain, "AS BUILT", on Lot 102 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 102 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 102 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:pak

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