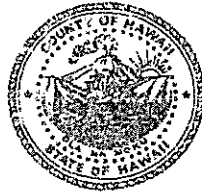


Harry Kim  
Mayor



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

February 11, 2004

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

Dear Mr. Triantos:

**VARIANCE PERMIT NO. 1408 WH (VAR 03-065)**  
**Agent/Applicant:** ROBERT D. TRIANTOS, ESQ.  
CARLSMITH BALL LLP  
**Owners:** THOMAS C. LOWE, ET AL.  
**Request:** Variance from Minimum Yards,  
Chapter 25, the Zoning Code  
**Tax Map Key:** 7-3-033:086, Lot 86

After reviewing your variance application, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No.1408 permits a portion of the dwelling improvements on Lot 22 or subject TMK property to remain, "AS-BUILT", with minimum 13.1 feet to 13.4 feet rear yard in lieu of the minimum 15.0 feet rear yard, according to the variance site plan map dated and signed on June 30, 2003. The variance request is from the subject TMK property's minimum yards pursuant to the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 1, Section 25-5-7, Minimum yards, (a) (1) (A).

### BACKGROUND AND FINDINGS

1. **Location.** The subject property, Lot 86 containing 11,114 square feet, is located within Kona Palisades-Unit II, File Plan No. 1087, and situated at Kalaoa 5<sup>th</sup>, 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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Robert D. Triantos, Esq.  
CARLSMITH BALL LLP  
Page 2  
February 11, 2004

2. **Variance Application-Site Plan.** The applicant submitted the variance application, attachments, and filing fee to the Kona Planning Department on or about October 2, 2003. The applicant's variance application site plan or survey map drawing is drawn to scale and dated September 29, 2003. The survey map by Thomas G. Pattison, RPLS, shows dwelling positions, roof eave location(s), and other site improvements, "AS BUILT", on "LOT 22", pursuant to an actual survey done on or about June 26, 2003.

**Note:** The variance request does not address the location of cesspool or other individual wastewater system (IWS) or site improvements straddling common boundary lines or walls within the right-of-way. Any other boundary encroachments must be addressed and resolved by the applicant or between or between the current property owner(s) and the affected agency(s)/ adjoining property owner(s).

3. **Agency Comments and Requirements-WH (VAR 03-065):**

- a. The Department of Public Works (DPW) memorandum dated October 20, 2003, states in part:

"We reviewed the subject application and our comments are as follows:

**BUILDING**

1. Buildings shall conform to all requirements of code and statutes pertaining to building construction, (see attached memorandum from our Building Division, dated October 16, 2003.)

**ROADWAYS**

1. The applicant shall remove any encroachments or obstructions within the County right-of-way."

- b. The County of Hawaii Fire Department's memorandum dated October 22, 2003, states:

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP  
Page 3  
February 11, 2004

“We have no comments to offer at this time regarding the above-referenced variance application.”

- c. The State Department of Health (DOH) memorandum dated November 13, 2003, states:

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

3. **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 notices were mailed on or about October 2, 2003 and October 16, 2003, by the applicant.
5. **Comments from Surrounding Property Owners or Public.** No further written comments or written objections to the variance application from agencies and surrounding property owner(s) or public were received.

However, a written request to mail a copy of the variance from an adjacent property owner, John Christoph Paulsen (Lot 87) was received on November 13, 2003.

### **SPECIAL AND UNUSUAL CIRCUMSTANCES**

It appears that the building encroachment problems were discovered during escrow or sale of the subject TMK property (Lot 86). The applicant, on behalf of the current owner, is trying to resolve building encroachment issues created by previous owner(s) or builders circa 1982-1984. 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 22. This site plan shows that a small portion of a two story dwelling was constructed "by others" beyond the lot's building lines or outside Lot 86's building envelope into Lot 86's front and southern side yard(s), pursuant to the Hawaii County Zoning Code. The applicant or current owners became aware of the encroachment issues after the recent survey map was prepared and presented during escrow. No evidence has been found to show indifference or premeditation by the past owners or builders to deliberately create or intentionally allow the building encroachment problems to occur. It appears that the original dwelling improvements constructed nearly 21 years ago were constructed under valid building

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP  
Page 4  
February 11, 2004

permits and other construction permits issued by the County. It appears that past or recent 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 at that time.

#### **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 2-story residence or dwelling improvements to fit within the correct building envelope prescribed by the Zoning Code.
2. Consolidation with portions of adjoining property (s) (ROW and Lot 85) and resubdivision of the resultant lot to modify property lines and adjustment of minimum yards.

#### **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 within the front yard(s) and side yard are not physically noticeable or visually obtrusive from adjacent property(s) or the right-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 rear yard identified on the variance application's site plan map will not detract from the character of the immediate neighborhood or the subdivision.

The subject variance application was acknowledged by letter dated October 9, 2003 and additional time to consider agency comments and neighborhood concerns 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 February 13, 2004.

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP  
Page 5  
February 11, 2004

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:

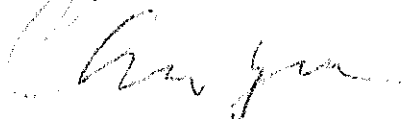
1. The applicant/owner, their assigns or successors shall be responsible for complying with all stated conditions of approval.
2. The applicant/owner(s), successors or assigns shall indemnify and hold the County of Hawaii harmless from and against any loss, liability, claim, or demand for the property 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 improvements located on the subject property will not meet Chapter 25, the Zoning Code's minimum yard requirements. The approval of this variance allows the dwelling improvements or "TWO STORY RESIDENCE" encroachments identified on the variance application's site plan map dated and signed on September 29, 2003 by Thomas G. Pattison, RPLS, to remain, "AS-BUILT", on the subject TMK property or "LOT 86".
4. The wall encroachments at "Address No. 73-4334" or within Ha'iku Place (County R-O-W) identified on the variance application's site plan map dated September 29, 2003 shall be removed by the current property owner(s) and/or prior to any sale of the subject property.
5. The location and status of any boundary "ROCK WALL" denoted on the variance site plan map dated and signed on September 29, 2003 by Thomas G. Pattison, RPLS, shall be resolved between the owner(s) of subject TMK property or Lot 86 and the owner(s) of the adjoining property(s).

Robert D. Triantos, Esq.  
CARLSMITH BALL LLP  
Page 6  
February 11, 2004

6. 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 86 or the subject TMK property.
7. Future building improvements and permitted uses on the subject tax map key property are 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  
Mr. John Christoph Paulsen