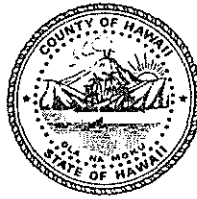


Harry Kim  
Mayor



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

#### CERTIFIED MAIL

7000 0600 0024 2905 2793

July 6, 2001

Mr. Klaus D. Conventz  
dba Baumeister Consulting  
P. O. Box 2308  
Kailua-Kona, HI 96745

Dear Mr. Conventz:

**VARIANCE PERMIT NO. 1210 WH(VAR 00-097)**  
**Applicant: KLAUS D. CONVENTZ**  
**Owners: CLIFFORD W. HELLARD, ET AL.**  
**Request: Variance from Minimum Yards,**  
**Pursuant to Chapter 25, Zoning**  
**Tax Map Key: 7-7-013:058, Lot 18**

After reviewing your application and the information submitted on behalf of it, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No. 1210 allows portions of the existing dwelling located on the subject TMK property, pursuant to a site plan dated October 10, 2000, to remain within that affected side yard "AS BUILT" with a minimum side yard of 9.8 feet from that respective side boundary line in lieu of the minimum 10 feet side yard as required by the Zoning Code, Chapter 25, Article 5, Division 1, Section 25-5-7, Minimum yards, (a), (2), (B) and, as amended by Ordinance No. 97 88.

#### BACKGROUND AND FINDINGS

1. The subject property containing 13,600 square feet is Lot 18, Holualoa Estates, Holualoa 4<sup>th</sup>, North Kona, Hawaii.

The property is zoned Single-Family Residential (RS-15) by the County in 1967.

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The subject property's geometry (property shape) is unusual and land area is below the minimum 15,000 square feet land area required for the RS-15 zone and is therefore deemed "non-conforming". The property is designated Urban "U" by the State Land Use Commission (SLU).

2. The applicant submitted the subject variance application which includes an explanation "SPECIAL & UNUSUAL CIRCUMSTANCES", dated November 1, 2000, with the subject variance application. This written explanation states in part:

"Clifford & Janet Hellard purchased the property in the conditions (footprint) it is today by Deed Doc. No. 94-074433 of May 6, 1994. Predecessors built the dwelling under permit nos. 886161, 895805, and 906036, which have received all final inspections.

The owners were unaware of any problems until a survey by KKM revealed setback and open space encroachments under current office policy and Zoning Ordinance (on October 10, 2000)."

"In any case the .2 feet encroachment along the easterly boundary would stand no matter what regulation/policy was applied. However (sic) this violation is limited to 2.4 inches, reflecting a protrusion of corner trim and siding only."

3. The site plan drawing, drawn to scale, by Kevin McMillen, LPLS, dated October 5 and October 10, 2000, identifies the location of the existing dwelling and other site improvements. The site plan identifies a building envelope which pursuant to a recent 2000 determination by the Planning Department (Kona) and identifies specific distances between portions of the dwelling/roof eave to the affected boundary line(s). However, subsequent to the interpretation of the property's building envelope in 2000, the applicant submitted copy(s) of building permits and a site plan extract showing minimum front, side, and rear yards or building setback determinations dated 1988 and 1990. The Planning Department's 1988 and 1990 "yard" determination(s) take precedence.

The building permits issued in 1988 and 1990 allowed the construction of one (2) story single family dwelling on the subject TMK property. (The site plan dated October 10, 2000 shall not be interpreted or construed to imply that there is/are separate "Dwelling" and "Dwelling and Garage" or 2-dwellings on the subject TMK property).

Note: The site plan, dated October 10, 2000, denotes and identifies existing CRM and "Dry Stack" Rock Wall(s), Stonewalls and the like, and other building improvements on the subject property and on and along the property's boundary line(s) and on adjacent property. Any existing and free-standing perimeter walls, fences, and retaining walls less than six (6) feet in height, and, located on and within the subject property may not require building permit(s) from the DPW. The subject variance request does not address any encroachment or building permit issues that may arise due to the location of existing walls or fences built on and along the boundary lines or straddling the subject TMK's or adjacent TMK's property boundary lines. Encroachment issues are resolved between respective property owner(s).

Furthermore, the presence and location of an existing cesspool or Individual Wastewater System (IWS) was not denoted or identified on the site plan submittal or addressed by the applicant.

4. A copy of the approved original detailed building construction plans to construct the existing dwelling and other site improvements in 1988 and 1990 were not submitted with the variance application. (The site plan dated October 10, 2000 shall not be interpreted or construed to imply that there is/are separate "Dwelling" and "Dwelling and Garage" or 2-dwellings on the property).
5. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated October 26, 2000 stating:

"This is to certify that Clifford Hellard (Owner-of-record) has paid all real property taxes due the County of Hawaii up to and including 12/31/00."

6. The State Department of Health (DOH) memorandum dated January 5, 2001, in the subject variance file states:

"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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7. The Department of Public Works (DPW) memorandum dated December 20, 2000, states in part:

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

1. Please refer to the attached Building Division comments dated December 18, 2000.

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

The attached DPW memorandum dated December 18, 2000 includes the following comments or following statements:

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

Plumbing permit M006303 for the subject dwelling was never finalized."

8. Proof of mailing a first and second notice was submitted to the Planning Department on November 3, 2000 and December 19, 2000, respectively. For the record, it appears that the first and second notice was mailed from Kailua-Kona on November 3, 2000 and December 20, 2001, respectively, by the applicant.

For the record, a copy of a public notice with handwritten notes dated December 24, 2000 was received by the Planning Department on January 4, 2001. The copy of a "PUBLIC NOTICE" and written comment(s) from "owner Lot 50" endorsing the referenced or listed applications on said public notice was incorporated into the subject variance file.

#### SPECIAL AND UNUSUAL CIRCUMSTANCES

The building problems were discovered during the sale of the subject TMK property. The applicant submitted a recent survey map/site plan that identifies the location of the existing dwelling and other site improvements. The site plan denotes and identifies the distance between portions of the dwelling and attendant roof eaves from the affected boundary line. A portion of the dwelling was constructed and encroaches into a side yard. Pursuant to the applicant, it appears the previous and current owner(s) were unaware of the building encroachment problem.

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Therefore, considering the foregoing facts and property circumstances, it is felt there are special or unusual circumstances applying to the subject property which exist either to a degree which deprive the current owner(s) of substantial property rights that would otherwise be available, or to a degree which obviously interferes with the best use or manner of development of the subject TMK property.

#### ALTERNATIVES

There are no reasonable alternatives in resolving the difficulty of the current owner(s) or applicant. Alternatives available to the owner(s) or applicant to address and correct the existing building encroachments include the following actions:

1. Remove the existing building encroachments within the affected side yard.
2. Redesign and relocate portions of the existing dwelling to fit within the building envelope prescribed by the Zoning Code and other design and building alternatives, etc.

To require or impose removal of the building encroachments and attendant roof eave(s) constructed by the previous owner(s) would seem unreasonably harsh and uneconomical at this time. The removal of the building encroachments or relocation of the existing dwelling may disrupt the dwelling's structural integrity, internal room circulation, and change the building's geometry and exterior character.

No evidence has been found to show indifference or premeditation by the current applicant or owner(s) to deliberately create or intentionally allow the building encroachment problems to occur. The applicant, on behalf of the current owner(s), is trying to resolve building encroachments that were built and established on the subject TMK property pursuant to previous building permit(s).

The Planning Department acknowledges there may be other design or building alternatives available to the applicant 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 current owner(s) when a more reasonable alternative is available by the granting of the subject variance request.

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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) and boundary/property lines. It appears that the existing 2 story dwelling was constructed under valid building permit(s) issued to previous owner(s). It appears that the building inspections of the premises, during building construction and throughout the life of the building permit(s) by the DPW did not disclose any building encroachments or building setback irregularities. The current owner(s) and applicant became aware of the encroachment problems during escrow to sell/purchase the property. The current owner(s) and applicant are trying to resolve building encroachment problems that were disclosed after a modern survey map was presented for escrow purposes.

The circumstances which permitted the existing building improvements to be built on the property are unique. The existing dwelling, "AS BUILT", was built under a series of building and other related construction permits issued by the County-DPW. The existing building encroachments or portions of the existing dwelling were built within a side yard of the non-conforming sized property.

It appears that existing building encroachments within the affected side yard are not physically and visually obtrusive from adjacent property or rights-of-way. It appears the building encroachments do not depreciate or detract from the character of the existing and surrounding neighborhood and land patterns. It appears the existing building (dwelling) encroachment(s) within that affected side yard was a building mistake which occurred in 1988 or 1990 or was a misinterpretation of the minimum building yards or boundary line(s) by the previous owner(s). Inspection of the property during the life of the building permit(s) issued by the County-DPW or other agencies did not detect or discover any building encroachment problem(s) or reveal and disclose any irregular building setback problems. Therefore, it is felt that the existing dwelling encroachments have not or will not detract from the character of the immediate neighborhood or the existing subdivision.

The subject variance application was acknowledged by certified letter dated December 13, 2000. Additional time to allow the Planning Director to understand and address agency comments was required. The applicant agreed to extend the date on which the Planning Director shall render a decision on the subject variance.

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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's 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

This applicant's 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 existing dwelling will not meet Chapter 25, the Zoning Code's, minimum side yard requirements. The approval of this variance allows the existing dwelling encroachments identified on the applicant's site plan, dated October 10, 2000, to remain on the subject TMK property. The applicant/current owner(s) is/are required to confer with the Department of Public Works (DPW-Building Division) and satisfy the requirements of plumbing permit M006303. Plumbing permit M006303 shall be closed by the DPW prior to any future sale or change in property ownership or title.
4. Future building improvements to or within the existing dwelling and permitted uses of the existing dwelling/premises on the subject TMK property shall be subject to State law and County ordinances and regulations pertaining to building construction and building occupancy.
5. No ohana permit shall be granted to allow or permit an ohana dwelling on the subject TMK property and no building permit(s) shall be issued to allow an ohana dwelling unit or second dwelling unit to be constructed or established on the subject TMK property.

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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,



*Ch* CHRISTOPHER J. YUEN  
Planning Director

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