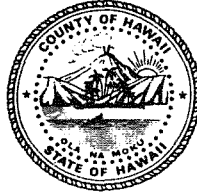


Harry Kim  
Mayor



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 2687

July 17, 2001

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

Dear Mr. Conventz:

**VARIANCE PERMIT NO. 1212 WH(VAR 01-001)**

**Applicant: KLAUS D. CONVENTZ**  
**Owners: WILLIAM & ELIZABETH DAVIS TRUST**  
**Request: Variance from Minimum Yards,**  
**Pursuant to Chapter 25, Zoning**  
**Tax Map Key: 7-3-039:058, Lot 237**

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. 1212 allows portions of the existing dwelling located on the subject property, pursuant to a site plan dated December 11, 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 7, Section 25-5-76, Minimum yards, (a), and Section 25-5-77, Other regulations.

#### BACKGROUND AND FINDINGS

1. The subject property containing 14,406 square feet is Lot 237, Kona Palisade, Unit III, File Plan 1146 at Kalaoa 5<sup>th</sup>, North Kona, Hawaii.

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It appears that the property was zoned Agricultural (A-5a) by the County in 1967. The subject property's geometry (property shape) is unusual and land area is below the minimum 5 acre land area required for the A-5a zone and is therefore deemed "non-conforming". The property is designated Urban "U" by the State Land Use Commission.

2. The applicant submitted "SPECIAL & UNUSUAL CIRCUMSTANCES" dated December 12, 2000 with the subject variance application. This written explanation states in part:

"Building Permits were issued for subject property for a dwelling on 7/17/1985 (Permit No. 06971), and an alteration July 17, 1986 (Permit No. 07607) which were both finalized.

It is obvious that the owner's contractor slightly mis-staked the foundation/framing, resulting in a miniscule violation of 2,4" <(sic)>(inches), limited to the extreme Southeast house corner only.

Consultant submits that the metal tool shed is portable and less than 120 square feet in footprint, wherefore a building permit is not required. In fact at the time the improvements were placed, any accessory structure (detached only) was permissible without rear setback. However, as the photo shows, a make-shift roof cover between the carport/lanai and the tool-shed, which is substandard, and added without permit, will be removed by owner, in order to comply with regulations.

Undersigned submits that the violation for which this variance is requested, is not only very small, it is in addition visually not perceptible from public view or neighbor lots, and any correction would be extremely costly considering the miniscule nature of the encroachment. Owner and applicant would like to point out that also the provisions of Section 25-2-51 apply in their entirety.

Wherefore the owner and applicant respectfully request the approval of the petition for variance as the only available reasonable alternative."

3. The site plan drawing, drawn to scale, by Kevin McMillen, LPLS, dated December 12, 2000, identifies the location of the existing dwelling and other site improvements. The site plan denotes and identifies the building envelope using a series of "broken" or "dashed" line(s) prescribed by the Hawaii County Zoning Code. A corner of the existing dwelling encroaches 0.2 feet (Approximately 2.4 inches) into a 10 foot side yard.

Note: The site plan, dated December 12, 2000 denotes and identifies the location of existing rock walls, "shed", and other existing site improvements on the subject property and adjacent property. The wall and other encroachments shall be addressed by the applicant or owner(s).

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

4. A copy of the approved original detailed building construction plans to construct the existing dwelling and other site improvements that were approved by the County or and other government agencies in 1985 were not submitted with the variance application. (The site plan dated December 12, 2000 shall not be interpreted or construed to imply that all building improvements on the property were constructed or permitted under building permits issued by the County or that there are separate living quarters located on the subject TMK property).

Note: Any existing and free-standing perimeter rock walls, fences, and retaining walls, less than six (6) feet in height, and, located on and within the subject property may not require any building permit(s) from the DPW. The existing rock wall improvements within the existing right-of-way must be removed and 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 side and rear boundary lines or straddling the subject TMK or adjacent TMK property lines. Encroachment issues must be resolved between the DPW and the respective property owner(s).

5. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated December 12, 2000 stating:

"This is to certify that William Davis (Owner-of-record) has paid all real property taxes due the County of Hawaii up to and including June 30, 2001."

6. The State Department of Health (DOH) memorandum dated January 12, 2001, in the subject variance file states:

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

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7. The Department of Public Works (DPW) memorandum dated January 31, 2001, states in part:

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

1. Please refer to the attached Building Division comments dated Jan. 22, 2001.
2. Any encroachments within the County right-of-way should be removed.

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

The attached Department of Public Works (DPW) memorandum dated January 22, 2001 includes the following comments or statements:

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

The electrical permit EK07026 for the subject dwelling was never finalized.

The minimum setbacks shall be maintained as follows:

Residential structures-3 ft. side, 3 ft. rear  
Commercial structures-5 ft. side, 5 ft. rear

Others: Structure(s) over 6'-0" require(s) building permit(s)."

8. Proof of mailing a first and second notice(s) were submitted to the Planning Department (Kona Office) on December 13, 2000 and January 11, 2001, respectively. For the record, it appears that the first and second notice(s) were mailed from Holualoa, HI 96725 on December 13, 2000 and January 10, 2001 respectively, by the applicant.

For the record, a copy of a public notice dated December 12, 2000 with attached handwritten note(s) by Lynn Vannatta Olival were received by the Planning Department on December 21, 2000.

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The written comment(s) state in part:

“Dear Planning Dept. I live at lot 247. TMK (3) 7-3: 39-06. (sic) If everyone up to this point has complied with the 10.0 ft setback, this person should have to also. I don’t want any president set by allowing a variance. Thank you

P.S. When we completed our home in 1982, we had to comply w/ stuff Lynn Olival”

#### SPECIAL AND UNUSUAL CIRCUMSTANCES

In view of the background and findings, it appears that a “corner” of the existing dwelling encroaches within a side yard during and was discovered during escrow to sell the subject property. The applicant submitted a recent survey map/site plan that identifies the location of the existing dwelling and encroachments within the affected side yard. The site plan identifies the distance between portions of the dwelling and attendant roof eaves from that affected side boundary line. It appears that the dwelling encroachments within the affected yard and other building encroachment problems were discovered during escrow to sell the subject property.

Therefore, considering the facts, 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 current owner(s) 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 TMK 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. Removal of 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 remedial building alternatives.

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To require or impose removal of the dwelling "corner" encroachments and modifying the 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 this portion may disrupt the dwelling's structural integrity, internal room circulation, and change the building's overall building geometry and exterior character.

No evidence has been found to show indifference or premeditation by the current owner(s) or applicant to deliberately create or intentionally allow the building's "corner" encroachment problems to occur. The applicant submitted the variance application to address and resolve the dwelling's encroachment problem within the affected yard on behalf of the owner(s). Furthermore, other non-permitted building improvements ("shed" and other building improvements) denoted on the applicant's site plan submittal and built within the property's rear yard will be removed.

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

The circumstances to permit the existing building improvements on the subject TMK property and allow the existing building encroachments to be built and established within that affected side yard are unique. Furthermore, the building encroachments have been built within a side yard on property that is deemed non-conforming by the Hawaii County Zoning Code.

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It appears that existing building encroachments into the affected side yard are not physically and visually obtrusive from adjacent property or the rights-of-way. It appears the 15 year old + building encroachments do not depreciate or detract from the character of the surrounding neighborhood and the existing and surrounding land patterns. It appears the existing encroachment(s) within the affected side yard was a building mistake which occurred in 1985 and 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 and other agencies did not discover any building encroachment problem(s) or reveal and disclose any irregular building problems. Therefore, it is felt that the existing dwelling encroachments within that side yard will not detract from the character of the immediate neighborhood or other property within the 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.

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.
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 December 11, 2000, to remain on the subject TMK property. The applicant or owner(s) is/are required to confer with the Department of Public Works (DPW-Building Division) to address and close electrical permit EK07026. Electrical permit EK07026 shall be closed prior to any future sale or change in property ownership or title.

The existing rock wall encroachments within the existing right-of-way or cul-de-sac (Wanane Place) and the shed and all non-permitted building improvements within the rear yard that are denoted and shown on the site plan dated December 11, 2000 shall be removed prior to any future sale or change in property ownership or title. The applicant shall submit proof to the Hawaii County Planning Department on or before October 31, 2001 or prior to any future sale or change in property ownership or title that the rock wall encroachments within the right-of-way and the shed and other non-permitted building improvements within the minimum 20 feet rear yard have been removed.

4. Future building improvements and permitted uses 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 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,



 CHRISTOPHER J. YUEN  
Planning Director

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xc: Real Property Tax Office - Kona  
Planning Dept. - Kona  
Lynn Vannatta Olival