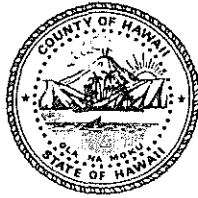


Harry Kim  
Mayor



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 2601

July 17, 2001

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

Dear Mr. Conventz:

**VARIANCE PERMIT NO. 1218 WH(VAR 01-017)**

**Applicant: KLAUS D. CONVENTZ**

**Owner: TRUDI O. GILL**

**Request: Variance from Minimum Yards**

**Pursuant to Chapter 25, the Zoning Code**

**Tax Map Key: 7-3-023:018, Lot 6**

After reviewing your variance application and information submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No. 1218 allows portions of an existing dwelling to remain on the subject TMK property, "AS BUILT", with a minimum 13.9 feet side yard in lieu of the minimum 15 feet side yard, pursuant to the applicant's map or site plan dated November 8, 2000. The variance is from Chapter 25, the Zoning Code, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), and Section 25-5-77, Other regulations.

#### BACKGROUND AND FINDINGS

- I. The subject property containing 21,198 square feet is Lot 6, Kona Coastview Subdivision, Unit V, File Plan 1029, Being a Portion of Grant 1606 to Kanehailua, Kalaoa 3<sup>rd</sup>, North Kona, Hawaii.

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address other wall encroachments or building permit issues that may arise due to the location of existing walls or fences shown on the applicant's site plan. Any existing walls or fences built on and along the respective side and rear boundary lines or straddling the subject TMK or adjacent TMK property lines. must be resolved between the applicant/owner and the DPW or between respective property owner(s).

5. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated January 29, 2001 stating:

"This is to certify that Trudi O Gill Trust (Owner-of-record) has paid all real property taxes due the County of Hawaii up to and including "12-31-2000"

6. The State Department of Health (DOH) memorandum dated April 3, 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."

7. The Department of Public Works (DPW) memorandum dated April 9, 2001, states in part:

"We have reviewed the subject application and have no comment:

1. Please refer to the attached Building Division comments dated March 27, 2001. If you have any questions please contact Kiran Emler of our Kona office at 327-3530."

The attached DPW memorandum dated March 27, 2001 states in part:

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

The 965230 permit for the subject dwelling was never finalized."

8. Proof of mailing a first and second notice was submitted to the Planning Department on February 5, 2001 and March 22, 2001, respectively. For the record, it appears that the first and second notice was mailed from Holualoa by the applicant on February 5, 2001 and March 22, 2001, respectively.

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9. Comments from Surrounding Property Owners. Several objection letter(s) and other correspondence to the variance application were received from the surrounding property owners, et al., and are part of the variance file. For the record they are:
- a) Objection letter from Rick Gaffney and Jeanette Foster, dated April 4, 2001, was received by the Planning Department (Hilo) on April 6, 2001.
  - b) Memorandum and request from Councilman, J. Curtis Tyler III, Hawaii County, dated April 10, 2001 and attached copy of the Gaffney/Foster objection letter dated April 4, 2001, were received by the Planning Department (Hilo) on April 16, 2001.
  - c) Handwritten objection letter from Wendy J. Wolford, dated April 17, 2001, was received by the Planning Department (Hilo) on April 19, 2001.
  - d) Handwritten objection letter from Juliette M. Guard, undated, was received by the Planning Department (Hilo) on April 19, 2001.

#### SPECIAL AND UNUSUAL CIRCUMSTANCES

It appears that the subject dwelling encroachment problems were discovered during the sale and escrow to sell the subject TMK property. The applicant submitted a recent survey map/site plan that identifies the location of the existing dwelling encroachments within the affected side yard and other existing building and site improvements. The applicant's site plan identifies the distance(s) between the dwelling encroachments and attendant roof eaves, "AS BUILT" and the affected side boundary line(s). Portions of the first 2-story house or dwelling constructed in 1989 under BP 896025 on the subject TMK property encroach within the minimum side yard. It appears the owner's builder was unaware of the building encroachment problem when the house was being constructed in 1989 and 1990.

The applicant, on behalf of the current owner(s), is trying to address and resolve the building encroachments that were built and established on the subject TMK property by the owner's builder or contractor hired to construct the dwelling under BP 896025. No evidence has been found to show indifference or premeditation by the owner's builder in 1989 or 1990 to deliberately create or intentionally allow the building encroachment problems to be occur. The applicant submitted the variance application to address and resolve the dwelling's encroachment problem within the affected side yard on behalf of the current owner(s) and to satisfy other escrow requirements.

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Therefore, considering the foregoing facts and circumstances, it is felt there are special or unusual circumstances which exist and apply to that existing dwelling located on the subject TMK property which exist and deprives the current owner(s) of substantial property rights that would otherwise be available and to a limited degree obviously interferes with the best use 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 identified on the applicant's site plan include the following actions:

1. Removal of the existing building "corner" encroachments that have been denoted and identified on the applicant's site plan. The "corner" building and attendant roof eave encroach 1.1 feet into one of the property's side yard(s).
2. Redesign and relocate portions of that 2-story dwelling to fit within the building envelope prescribed by the Zoning Code and other design and remedial building alternatives.

To require or impose removal of the dwelling's "corner" encroachments and modifying the attendant roof eaves(s) constructed by the owner's builder in 1989 under BP 896025 would seem unreasonably harsh and uneconomical at this time. The removal of the 1.1 feet "corner" building encroachments or relocation of the affected living areas within the 2-story dwelling may disrupt that dwelling's structural integrity, internal room circulation, and change the building's overall building geometry and exterior character.

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.

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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 (BP 896025) issued to the previous owner's builder or contractor. It appears that the building inspections of the dwelling and premises, during building construction and throughout the life of the building permit did not disclose any building encroachments or setback irregularities. The applicant and current owner(s) became aware of the encroachment problems during escrow to sell the TMK property. The current owner(s) are trying to resolve building encroachment problems that were disclosed after a modern survey map was presented for escrow purposes.

The circumstances to allow the building encroachments to be built within the affected side yard and chronology to allow other building improvements on the subject TMK property are unusual and unique. The existing building encroachments are limited to a side yard on this non-conforming sized TMK property (Lot 6).

It appears that existing building encroachments that were established within the affected side yard built in 1989 were not physically and visually perceptible from adjacent property(s) or the existing rights-of-way. It appears the limited 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 building (dwelling) encroachment(s) within that affected side yard was a building mistake or misinterpretation of the minimum building yards or boundary line(s) that was committed by the owner's builder or contractor in 1989. It appears that building inspections of the subject TMK property during the life of the building permit(s) issued to construct the existing building improvements on the subject TMK property did not discover any building encroachment problem(s) or reveal and disclose any irregular building setback problems. Therefore, it is felt that the identified dwelling encroachments within the affected side yard will not detract from the character of the immediate neighborhood or the subdivision.

The subject variance application was acknowledged by certified letter dated March 20, 2001. Additional time to allow the Planning Director to obtain and study past building permits and understand other agency comments was necessary. The applicant agreed to extend the date on which the Planning Director shall render a decision on the subject variance. (Reference is made to a copy of the applicant's letter dated March 22, 2001, in the subject variance file).

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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 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 lots or TMK properties.

#### VARIANCE DECISION AND CONDITIONS

This variance request is approved subject to the following variance 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 original dwelling and attendant roof eave constructed under BP 896025 on the subject TMK property (Lot 6) 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 November 8, 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 complete all building requirements under BP 965230. BP 965230 shall be closed by the DPW on or before October 31, 2001 or prior to any future sale or change in property ownership or title.

4. No variance from Chapter 25, the Zoning Code or Chapter 23, Subdivisions, shall be granted to permit further construction or expansion of the existing ohana dwelling.
5. 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.

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Should any of the foregoing variance 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:cps  
P:\WP60\WRY\FORMLETT\VARAPPTMK73023018.CONVENTZKONA

xc: Real Property Tax Office - Kona  
Planning Dept. - Kona  
Rick Gaffney and Jeannette Foster  
Wendy J. Wolford  
Juliette M. Guard  
Councilman, Curtis J. Tyler, III

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The property is zoned Agricultural (A-5a) by the County and designated Urban "U" by the Land Use Commission (LUC). The property's land area is below the minimum 5-acre lot size area required for the A-5a zone designation and is therefore deemed "non-conforming".

To date, it appears that 2-building permits were issued to construct 2-dwellings on the subject TMK property.

The first dwelling was permitted in 1989 and constructed under BP 896025 on the subject TMK property (Lot 6). The copy of the building permit application (BP 896025) obtained from the Department of Public Works (DPW-Building Division) lists "Thomas Waddle" as "Builder". It appears that "Thomas J Waddle" signed the building permit application on behalf of the owner "Trudi Gill". It appears that BP 896025 was issued to the "Builder-Thomas Waddle" on behalf of the listed legal owner, "Trudi Gill" on August 15, 1989.

In 1994, the recorded property owner, Trudi O. Gill submitted an ohana dwelling application request for an additional single family dwelling. By letter dated February 11, 1995 an Ohana Dwelling Permit (OHD 3003) to allow an ohana dwelling or second dwelling to be constructed on the subject TMK property (Lot 6) was granted by the Planning Department.

The second dwelling was permitted in 1996 and constructed under BP 965230 on the subject TMK property (Lot 6). The copy of the building permit application (BP 965230) obtained from the DPW-Building Division lists "Owner/Builder and applicant/legal owner, "Trudi O. Gill", to construct the ohana dwelling on March 25, 1996.

2. The applicant submitted a variance application to the Kona Planning Department on February 5, 2001 and attached an explanation "SPECIAL & UNUSUAL CIRCUMSTANCES" dated February 3, 2001 with the subject variance application. This explanation states in part:

"Subject property is the unit 1 (or unit A = residence) of a CPR-property on Ahikawa Street. The dwelling received building permits nos. 896025 (8-15-1989), and 965230 (3-25-1996).

Owner was unaware of any encroachment when a survey by Wes Thomas Associates revealed a violation on November 8, 2000, which was limited to the extreme Southeast corner only with 13.2" (inches).



There is no evidence of malice or intent, and obviously a miniscule siting error by owner's contractor.

The open spaces to eaves etc. are in proper distances established. The encroachment is visually not perceptible from public view or neighbor lots. Any structural correction would be very unattractive and extremely expensive."

3. A map or site plan drawing of the subject TMK property, drawn to scale and dated November 8, 2000, was certified by Chrystal T. Yamasaki, LPLS, and submitted with the applicant's variance application. The site plan denotes and identifies the building envelope using a series of "broken" or "dashed lines" prescribed by the Hawaii County Zoning Code. A corner of an existing "2-Story House" and attendant roof eave encroach 1.1 feet into a side yard.

In addition, the site plan, dated November 8, 2000, denotes and identifies the location of other existing dwelling improvements, water tank, stonewalls, and other related building and site improvements. Any stone wall or other boundary encroachments problems shall be addressed by the applicant or between respective property owner(s).

The presence and location of existing cesspool(s) or Individual Wastewater System(s) (IWS) were not denoted or disclosed on the applicant's site plan submittal.

4. A copy of the approved original detailed building construction plans to permit construction of the affected dwelling and building encroachments(s) under BP 896025 were not submitted with the variance application.

Pursuant to DPW building records, it appears that BP 896025 was opened by the DPW-Building Division on August 15, 1989 and closed on June 20, 1990. The ohana dwelling building permit, BP 965230, was opened on March 25, 1996 was never closed or "finaled" by the DPW-Building Division.

Note: The Planning Department could not determine if the existing perimeter wall improvements identified on the November 8, 2000 site plan were permitted or constructed under the building permit(s) issued by the DPW. Thus, any existing and free-standing perimeter rock walls, retaining rock walls, fences, and other perimeter wall features, less than six (6) feet in height, and, located within the subject TMK property may or may not require any building permit(s) from the Department of Public Works (DPW). The subject variance request does not