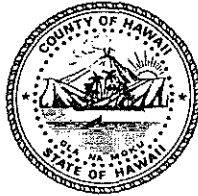


Harry Kim
Mayor



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

December 5, 2001

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

Dear Mr. Conventz:

VARIANCE PERMIT NO. 1229 WH (VAR 01-019)

Applicant: KLAUS D. CONVENTZ
Owner: JANET DITTO BOSWELL
Request: Variance from Minimum Yards,
Pursuant to Chapter 25, Zoning
Tax Map Key: 7-6-024:017, Lot 17

After reviewing your application, site plan, and the information submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No. 1229 allows portions of that existing 2-story dwelling located on the subject property to remain within that affected side yard, "AS BUILT", pursuant to the applicant's site plan dated February 12, 2001. The dwelling will be allowed to remain with a minimum side yard of 9.9 feet in lieu of the minimum ten (10) feet side yard, pursuant to the Zoning Code, Chapter 25, Article 5, Division 1, Section 25-5-7, Minimum yards, (a), (2), (B).

BACKGROUND AND FINDINGS

1. **Property Description and Location.** The subject property containing 10,001 square feet is Lot 17 of the "Kalani Makai", Unit 1, Being a Portion of Royal Patent 4475, Land Commission Award, Apana 42 to V. Kamamalu, Holualoa, North Kona, Hawaii.

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The property is zoned Single-Family Residential (RS-10) by the County and designated Urban "U" by Land Use Commission (LUC).

According to an ohana dwelling permit file (OD 89-336), two (2) single-family dwellings were permitted and built on the subject TMK property.

2. **Variance Application/Applicant's Explanation-Request.** The applicant submitted the variance application, site plan, supplemental information, tax clearance, and \$250.00 filing fee on February 21, 2001.
3. **Variance Application-Site Plan.** The applicant's map or site plan drawing, drawn to scale, was surveyed and prepared by Wes Thomas Associates. The site plan, dated February 12, 2001 denotes and identifies the existing location of a 2-Story House (dwelling) and identifies a building line which defines an area and sets identifies a limit where building or structures (dwelling) may not be built. Portions of the 2-story dwelling were exceed this building limit and encroach 0.1 feet into a minimum ten (10) feet side yard.

In addition, the site plan, dated February 12, 2001, identifies a concrete driveway, rock walls, and other building and site improvements on and within the subject property and on adjacent property. Some of the walls straddle common boundary lines and shall be addressed by the applicant and respective owner(s).

The applicant's site plan does not denote or identify the location of any existing cesspool(s) or Individual Wastewater System(s) (IWS).

4. **Building Permit Records.** The copy of the approved original detailed building construction plans to construct this dwellings and other existing structures and site improvements, circa 1990, were not submitted with the variance application. (The site plan dated February 12, 2001, does not identify the location of second existing dwelling on the subject TMK property and shall not be interpreted or construed to imply that this dwelling and other site improvements not shown or identified will comply with the requirements of the Zoning Code).

Perimeter and Retaining Wall(s): Any other existing driveways, free-standing perimeter walls, fences, and other interior retaining walls, less than six (6) feet in height, respectively; and, located on and within the subject TMK property may not require any building permit(s). The existing perimeter walls straddling the boundary lines or any boundary encroachments must be addressed and resolved by the applicant and the affected parties or between legal property owner(s).

5. **Agency Comments and Requirements.**

- a. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated February 21, 2001 stating:

"TMK(s) 3/7-6-024-017-0002"

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

- b. The State Department of Health (DOH) memorandum dated April 3, 2001, states in part:

"We have no objections to the proposed variance application if the subject lot is sewerred. If the subject lot utilizes an Individual Waste Water System, setback requirements need to be met."

- c. The Department of Public Works (DPW) memorandum dated April 9, 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 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 includes the following comments and statements:

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

The 896651 & M905355 permit for the subject dwelling was never finalized."

6. **Notice to Surrounding Property Owners.** Proof of mailing a first and second notice was submitted to the Planning Department (Kona Office) on February 21, 2001 and March 22, 2001, respectively. For the record, it appears that the first and second notice was mailed from Holualoa, HI, 96725, on February 20, 2001 and March 22, 2001, respectively, by the applicant.
7. **Comments from Surrounding Property Owners or Public.** No other written agency comments or objections from the surrounding property owner(s) were received.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The building problems were discovered during the sale of the subject 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 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. It appears the previous and current owner(s) were unaware of the building encroachment problem.

Therefore, considering the foregoing facts and 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/applicant 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 property.

ALTERNATIVES

There are no reasonable alternatives in resolving the difficulty of the applicant or current owner(s). Alternatives available to the applicant to address and correct the existing building encroachments include the following actions: Removing the existing building encroachments, relocating the dwelling to fit within the correct building envelope prescribed by the Zoning Code, and/or other similar design alternatives, etc.; and, would be uneconomical at this time. The removal of the building encroachments and attendant roof eave(s) constructed by the previous owner(s) will disrupt the dwelling's structural integrity and relationship to and between other existing site improvements.

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

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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). 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 building encroachments or setback irregularities. The applicant and current owner(s) became aware of the encroachment problems during escrow to sell/purchase the property. The current owners 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 building encroachments have been built within a side yard on a non-conforming sized property.

It appears that existing building encroachments into 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 surrounding neighborhood, public uses, and the existing and surrounding land patterns. It appears the existing building (dwelling) encroachment(s) within that affected side yard was a building mistake which occurred in 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 or other agencies did not discover any building encroachment problem(s) or reveal and disclose any irregular building setback problems. Therefore, it is felt that the existing dwelling encroachments 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 understand and address agency comments was required. Pursuant to the applicant's letter dated March 22, 2001, the applicant agreed to an extension of time to render a decision on the subject variance request.

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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 properties.

PLANNING DIRECTOR'S DECISION AND VARIANCE CONDITIONS

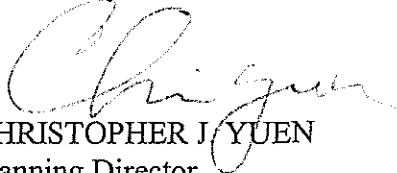
This variance request is approved subject to the following conditions:

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 existing 2-story dwelling identified on the applicant's site plan dated February 12, 2001 will not meet Chapter 25, the Zoning Code's minimum side yard requirements. The approval of this variance is limited to the 2-story dwelling encroachments identified on the site plan, dated February 12, 2001 within the affected side yard. The approval of this variance does not address any other building encroachment issues on Lot 17 or subject TMK property.
4. The applicant shall contact the DPW-Building Division to address and satisfy the requirements of Permit No(s). 896651 and M905355. These permits shall be "finaled" or closed by the DPW prior to conveyance of the subject TMK property. No further building permits to allow expansion of the existing single family 2-story ohana dwelling will be permitted.
5. Future building improvements and permitted uses 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 conditions not be complied with, the Planning Director may proceed to declare this Variance Permit null and void.

Sincerely,



CHRISTOPHER J. YUEN
Planning Director

CJY/WRY:cps
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xc: Real Property Tax Office (Kona)
Kona Office File
OD 89-336 File