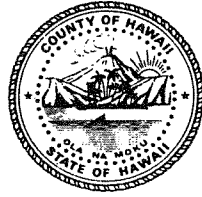


Harry Kim
Mayor



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 2663

July 17, 2001

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

Dear Mr. Conventz:

VARIANCE PERMIT NO. 1213 WH(VAR 01-002)

Applicant: KLAUS D. CONVENTZ
Owner: SARAH ALLER
**Request: Variance from Minimum Yards
and Open Space Requirements,
Pursuant to Chapter 25, Zoning**
Tax Map Key: 7-5-026:036, Lot 79

After reviewing your application and the information submitted on behalf of it, the Planning Director approves Variance Permit No. 1213 to allow certain portions of the existing dwelling to remain "AS BUILT" on the subject TMK property. The variance allows portions of the existing dwelling to remain with a minimum 7.7 feet side yard and minimum 3.7 feet open space from that respective side boundary line in lieu of the minimum required 10 feet side yard and 5 feet open space requirement pursuant to the Zoning Code, Chapter 25, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), Section 25-5-77, Other Regulations, and Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open spaces, respectively.

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BACKGROUND AND FINDINGS

1. The subject property containing 9212 square feet is Lot 79, Kona Heights, Increment 1, File Plan 1075, at Hienaloli 5th and 6th, North Kona, Hawaii.

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".

2. The applicant submitted an attachment "SPECIAL & UNUSUAL CIRCUMSTANCES", dated December 21, 2000, which states in part:

"Sarah Aller recently purchased the property, which was improved in 1979 under Building Permit No. 03808 by contractor (sic) of one of her predecessors in the property.

Pending escrow KKM-Survey revealed a miniscule encroachment of 1.2 to 3.6 inches into the setback relative to the East side of boundaries with lots 77 and 78, with a violation of clear space (eaves) of 3.6 inches, limited, however, to the extreme Southeast corner of the dwelling only.

It has been over 20 years since the obvious slight staking error occurred, of which previous owners were not aware. The encroachment is neither visually perceptible from public land or neighbor lots. 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)."

3. The site plan drawing, drawn to scale, by Kevin McMillen, LPLS, dated November 27 and November 30, 2000, identifies the location of the existing dwelling and other site improvements on the subject TMK property.

Note: The site plan also identifies and denotes the location of existing CRM rock wall(s) within "LOT 79" and on and within adjacent "LOT 78" and "LOT 80".

Furthermore, the presence and location of a cesspool or Individual Wastewater System (IWS) on "LOT 79" was not denoted or identified on the site plan submittal submitted by the applicant.

4. A copy of the approved original site plan and detailed building construction plans to construct the existing dwelling and other site improvements on the TMK property, purportedly, "over 20 years since the obvious slight staking error" were not provided or submitted with the variance application.

Note: Any existing and free-standing CRM perimeter walls, wooden fence, and retaining walls, less than six (6) feet in height located on and within the subject property or along the common boundary lines may not require any review or building permit(s) from the DPW. Any wall or fence improvements or encroachment within the Aloha Kona Drive right-of-way and constructed by the owner(s) must be removed. The subject variance request does not address any wall or fence encroachment or building permit issues that may arise due to the location of existing walls or fences built on and along the front or side 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) or by the applicant.

5. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated December 21, 2000 stating:

"This is to certify that Peter Robinson etal (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 12, 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 February 1, 2001, states in part:

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

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

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8. Proof of mailing a first and second notice was submitted to the Planning Department on December 21, 2000 and January 11, 2001, respectively. For the record, it appears that the first and second notice was mailed from Holualoa on December 21, 2000 and January 10, 2001, respectively, by the applicant.

SPECIAL AND UNUSUAL CIRCUMSTANCES

In view of the above, portions of the existing dwelling have been constructed and encroach into a side yard and portions of the attendant roof eaves encroach into the minimum open space required. These building encroachment were discovered during the sale of the subject property and the applicant submitted a recent survey map/site plan that identifies the location of the existing dwelling and other site improvements located on the subject TMK property or Lot 79. The site plan denotes and identifies distance(s) between the dwelling's and attendant roof eave encroachments and the affected side boundary line. The applicant alleges that the portions of the dwelling and roof eaves encroachments within the affected yard and open space were built by a "contractor" and it appears that previous owner and current owner(s) were unaware of the building encroachment problem.

Therefore, considering the above 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 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 of 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 the applicant to address and correct the existing building encroachments within the affected side yard and open space include the following actions:

1. Removing portions of the existing dwelling and roof eaves constructed within the affected side yard and open space.
2. Redesign and relocate portions of the existing dwelling, roof truss and other built improvements 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 the removal of the dwelling and roof encroachments, relocating the building wall and roof shape and trusses which were constructed by the previous contractor or owner(s) would seem unreasonably harsh and uneconomical at this time. The removal of the portions of the dwelling's living area and attendant roof eave(s) constructed by the previous owner(s) may disrupt the existing dwelling's structural integrity, impact internal room circulation, and change the building's overall and exterior building geometry and relationship with the existing carport and other site improvements.

No evidence has been found to show indifference or premeditation by the past or current owner(s) or applicant to deliberately create or intentionally allow the building and roof eave encroachment problems to occur. The applicant submitted the variance application to address and resolve this dwelling's encroachment within the affected yard on behalf of the current owner(s) and to satisfy escrow and other sale requirements.

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 dwelling and carport were 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 within the affected yard and minimum open space. The current owner(s) and the applicant 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.

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It appears that existing building encroachments into the affected side yard and open space 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 and open space was a building mistake which occurred 20 years ago and was a misinterpretation of the minimum building yards or boundary line(s) by the contractor and 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 January 4, 2001. 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 VARIANCE CONDITIONS

This 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.

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3. Portions of the existing dwelling and roof eave will not meet minimum side yard and minimum open space requirements, pursuant to Chapter 25, the Hawaii County Zoning Code. The approval of this variance allows the existing dwelling encroachments denoted and identified on the applicant's site plan, dated and certified on November 30, 2000, to remain on the subject TMK property.
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.

Should any of the foregoing conditions not be complied with, the Planning Director may proceed to declare this Variance Permit null and void.

Sincerely,



jc CHRISTOPHER J. YUEN
Planning Director

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