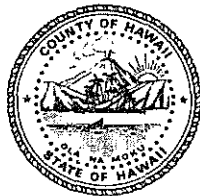


Harry Kim  
Mayor



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 2904 2862

July 23, 2001

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

Dear Mr. Conventz:

**VARIANCE PERMIT NO. 1220 (VAR 01-042)**

**Applicant: KLAUS D. CONVENTZ**  
**Owners: DOUGLAS M. McILROY, ET AL.**  
**Request: Variance from Minimum Yards  
and Open Space, Pursuant to  
Chapter 25, the Zoning Code**  
**Tax Map Key: 6-8-018:010, Lot 15**

After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No.1220 allows portions of that existing dwelling that were constructed within the affected side yard to remain, "AS BUILT", pursuant to the applicant's April 24, 2001 site plan. The variance is to allow portions of the existing dwelling to remain with a minimum 7.7 feet to 9.6 feet side yard in lieu of the minimum 10 feet side yard and allow a minimum 3.0 feet to 4.9 feet open space between the attendant roof eaves and that side boundary line in lieu of the minimum 5 feet required. The subject variance is from the minimum 10 feet side yard and 5 feet open space requirements pursuant to the Zoning Code, Chapter 25, Article 5, Division 7, Section 25-5-7, Minimum yards, (a), (2), (B), 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. **Location.** The subject TMK property, containing 12,637 square feet, is Lot 15, of "Waikoloa Village", Unit 1-D, (File Plan 1191), Waikoloa, South Kohala, Hawaii. The property is also commonly described as TMK: 6-8-018:010, Lot 15. The property is zoned Single-Family Residential (RS-10) and is designated Urban "U" by the State Land Use Commission.
2. **Application.** The applicants submitted the variance application form, supplemental information, tax clearance, and \$250.00 filing fee check on May 11, 2001.
3. **Site Plan.** The applicant's map or site plan drawing, drawn to scale and dated April 24, 2001, was surveyed and prepared by Donald C. McIntosh, LPLS. The site plan denotes and identifies the existing dwelling, dwelling encroachments within a side yard, shed, and other wall encroachments as of April 24, 2001. 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. Portions of the existing dwelling and roof eaves have been constructed into the 10 feet wide side yard and minimum 5 feet open space requirements. Portions of the dwelling, between 0.4 feet and 7.0 feet, have been built within the minimum 10 feet side yard and 5 feet clear space requirements and do not comply with minimum yards of the County Zoning Code.

The site plan drawing, dated April 24, 2001, also denotes and identifies the location of a shed and show other "CRM Wall", "Blockwall", and wall improvements. It appears that portions of these existing rock and retaining walls encroach into the right-of-way (Niu-Haohao Place) and adjacent "LOT 14" and "LOT 15".

The shed and rock wall encroachments shall be resolved by the applicant or between respective property owner(s).

4. **Building Permit(s).** A copy of the original building permit(s)-BP 896180, 935699, and 935727 and associated County approved detailed building construction plans to construct the dwelling and other necessary site improvements between 1989 and 1993 were not submitted with the applicant's variance application. (The site plan dated April 24, 2001 shall not be interpreted

or construed to imply that other site improvements denoted and located on the site plan were constructed or permitted under those building permits issued by the County).

5. Agency Comments and Requirements.

- a. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated May 10, 2001 states in part the following:

"TMK(s): (3) 6-8-018-010-0000"

"This is to certify that McIlroy, Douglas (owner of record) has paid all Real Property Taxes due to the County of Hawaii up to and including June 30, 2001."

- b. The State Department of Health (DOH) memorandum dated May 29, 2001, in the subject variance file states in part:

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

- c. The Department of Public Works (DPW) memorandum dated May 30, 2001, states in part:

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

1. Please refer to the attached Building Division comments dated May 25, 2001.
2. Any encroachments with the County right-of-way should be removed."

The Department of Public Works memorandum dated May 25, 2001, states in part:

"Approval of the application shall be conditioned on the comments as noted below.

Shed located on property line. There is no building permit for shed shown."

Mr. Klaus D. Conventz  
dba BAUMEISTER CONSULTING  
Page 4  
July 23, 2001

6. **Notice to Surrounding Owners.** Proof of mailing a first and second notice(s) were received by the Planning Department (Kona Office) on May 11, 2001 and May 23, 2001, respectively. For the record, it appears that the first and second notice(s) were mailed from Holualoa, HI 96725 on May 11, 2001 and May 23, 2001, respectively.
7. **Comments from Surrounding Property Owners or Public.** No written comments or letters regarding the subject variance request were received.

#### SPECIAL AND UNUSUAL CIRCUMSTANCES

In consideration of the applicant's submittals and findings above, it appears that 2 "corners" and attendant roof eaves of the 2-story dwelling built on the subject TMK property built between 1989 and 1993, approximately 12 years ago, encroach into the subject TMK property's side yard. This encroachment comprises approximately 6.4 square feet of the dwelling intruding into the subject TMK property's "northeast" side yard. The bulk of the dwelling or remaining living areas within the dwelling and attendant roof eaves are within the building envelope or building lines prescribed by the Zoning Code.

The applicant submitted a recent survey map/site plan and written report by a surveyor that identifies the location of the existing dwelling's encroachments within that affected side yard. The site plan denote and identify distances between portions of the dwelling's (corners) wall and attendant roof eaves from the front and side yard boundary line(s). It appears that that 2-corners were inadvertently built approximately 0.4 feet and 2.3 feet into one of the property's side yards, and the corresponding open spaces shown are 4.9 feet and 3.0 feet, respectively. It appears the applicant or current owner(s) were unaware of any building encroachment issues or problem.

Therefore, considering the applicant's submittals, 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 applicants 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 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. Remove or truncate the "corners" and attendant roof eaves that encroaches into the affected side yard.

Mr. Klaus D. Conventz  
dba BAUMEISTER CONSULTING  
Page 5  
July 23, 2001

2. Redesign and relocate the existing 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 these "corners" or dwelling's encroachments and modifying the attendant roof eave(s) would seem unreasonably harsh and uneconomical at this time. The removal of the building encroachments or relocation of these existing improvements may disrupt the dwelling's structural integrity, change internal room lighting and air circulation, and change the building's overall building geometry and exterior character.

No evidence has been found to show indifference or premeditation by the applicant or current owner(s) to deliberately build or intentionally allow the building encroachment problems to occur. The applicant submitted the variance application to address and resolve the dwelling's encroachment problem within the affected side yard. Furthermore, any non-permitted building improvements ("Shed" and "CRM Wall"(s) and other retaining or perimeter wall improvements) denoted on the applicant's site plan submittal and built within the adjacent TMK property's will be removed and addressed between respective property owners.

The Planning Department acknowledges there may be other design or building alternatives available to the applicants 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 owners when a more reasonable alternative is available by the granting of the subject variance request.

Note: The existing perimeter rock walls or retaining walls within the property, less than six (6) feet in height, and identified on the applicant's site plan may not require any building permits from the DPW. However, the rock wall encroachments straddling a common side boundary line should be addressed between the applicant or respective owners. The subject variance request is limited to dwelling encroachments within the side yard which are identified on the applicant's site plan dated April 24, 2001 and does not include or address the shed or other wall/building encroachments or building permit issues.

#### 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 was constructed under a series of

Mr. Klaus D. Conventz  
dba BAUMEISTER CONSULTING  
Page 6  
July 23, 2001

building permit(s) issued to the owners 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. All three (3) building permits issued by the DPW-Building Division to construct the dwelling were closed by the DPW-Building Division on August 5, 1993. The applicant and current owners are trying to resolve building and other encroachment problems that were disclosed after a modern survey or the existing property was performed and a map of existing conditions was prepared.

The circumstances to allow and permit the existing building and dwelling encroachments to be built and remain within that affected side yard and respective open space over 12 years ago are unique. Furthermore, the dwelling encroachments have been built within a side yard on property that exhibits a sloping nature and severe topography.

It appears that the commencement of building activity and the dwelling encroachments built into or within that affected side yard in 1989 were not perceptible and not physically and visually obtrusive from adjacent TMK property(s) or the rights-of-way. It appears the 12 year old + dwelling 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 the owner(s)/ builder's mistake which began in 1989 or a misinterpretation of the minimum building yards or boundary line(s) by the owners or builder. Inspection of the TMK property during the life of three (3) building permits issued by the County and other agencies did not discover any dwelling encroachment problem or reveal and disclose any irregular building problems. Therefore, it is felt that the existing dwelling encroachments within that side yard and respective side open space will not detract from the character of the immediate neighborhood or other surrounding property within the subdivision.

The subject variance application was acknowledged by certified letter dated May 17, 2001. 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:

Mr. Klaus D. Conventz  
dba BAUMEISTER CONSULTING  
Page 7  
July 23, 2001

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 and open space requirements. The approval of this variance allows the dwelling identified on the site plan submitted with the variance application, dated April 24, 2001 to remain on the subject TMK property.
  - 3a) The applicant or owner(s) shall confer with the DPW-Building Division and remove the existing "Shed" located on and within the subject TMK property identified on the variance application's site plan dated April 24, 2001.
  - 3b) The applicant or owner(s) shall confer with the DPW-Engineering Division and remove the portions of the existing "Block Retaining Wall", and "CRM Wall" constructed within the County right-of-way (Niu-Haohao Place) and identified on the variance application's site plan dated April 24, 2001.

The applicant shall address and satisfy 3a and 3b and shall submit proof by way of a letter or memorandum from the DPW-Building Division and DPW-Engineering Division(s), respectively, to the Hawaii County Planning Department on or before October 31, 2001, that the shed and wall encroachments, respectively, have been removed.


4. The applicant shall address and satisfy Condition No. 3 before the applicant or current owner(s) submit any further building plans and building permit application(s) for review and approval. 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.

Mr. Klaus D. Conventz  
dba BAUMEISTER CONSULTING  
Page 8  
July 23, 2001

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,

  
CHRISTOPHER J. YUEN  
Planning Director

WRY:pak

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xc: Real Property Tax Office (Kona)  
Kona Office File