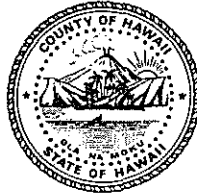


Harry Kim
Mayor



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. 1233 WH (VAR 01-053)
Applicant: KLAUS D. CONVENTZ
Owners: WALTER D. ACKERMAN, ET AL.
**Request: Variance from Minimum Yards
and Open Space Requirements,
Pursuant to Chapter 25, the Zoning Code**
Tax Map Key: 6-5-002:185, Lot 2-A

After reviewing your variance application and background information, the Planning Director hereby certifies the approval of your variance request subject to conditions. Variance Permit No. 1233 allows portions of the dwelling encroachments into a side yard and side yard open space to remain, "AS BUILT". According to the applicant's site plan dated June 28, 2001, the variance allows portions of the dwelling (2-story house) to remain on Lot 2-A with a minimum 13.6 feet side yard and minimum 9.1 feet side yard open space between the attendant roof eaves (building projection) and the affected side boundary line. The subject variance is from the subject property's minimum 15 feet side yard and minimum 10 feet side yard open space requirements, pursuant to the Zoning Code, Chapter 25, Article 5, Division 7, Section 25-5-7, Minimum yards, (a) (3) (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 20,000 square feet, is Lot 2-A, being portions of Lot 5-B of Bloc 7 of Waimea Homesteads and Grant 6311 to Keao Kailikini, and is situated at Waimea, South Kohala, Hawaii. The property is also commonly described as TMK: 6-5-002:185, Lot 2-A. The property is zoned Single-Family Residential (RS-20) and 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 July 9, 2001.
3. **Site Plan.** The applicant's map or site plan drawing, drawn to scale and dated June 28, 2001, was surveyed by Chrystal Thomas Yamasaki, LPLS and prepared by Wes Thomas and Associates. The site plan denotes and identifies the existing dwelling and the respective distances between the dwelling and the respective yard(s). The site plan identifies the building envelope prescribed by the Hawaii County Zoning Code. Portions of the existing 2-story dwelling and attendant roof eaves have been constructed into the minimum 15 feet wide side yard and the corresponding minimum 10 feet open space requirements along the side boundary line(s). The "2-story house" or dwelling encroaches 1.4 feet into the respective minimum 15 feet side yard and the attendant roof eave encroaches 0.9 feet into the corresponding minimum 10 feet side yard open space required by the Zoning Code.

The applicant's site plan drawing does not denote or identify the location of an existing cesspool or other Independent Wastewater System (IWS).

The applicant's site plan drawing denotes and identifies the location of a "1-story building" and other site improvements within a 80-foot wide scenic easement. The location or permission to allow building or other site improvements within this easement shall be resolved by the applicant or between affected land owner(s).

4. **Building Permit(s).** Copy(s) of the original building permit and associated permits to construct the dwelling and other site improvements were not submitted with the applicant's variance application. County records indicate that all building and associated construction permits issued by the DPW-Building Division were closed.

5. **Agency Comments and Requirements.**

- a. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated July 9, 2001 states in part the following:

"TMK(s) (3) 6-5-2-185"

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

Reference: NDIC-TX08"

- b. The State Department of Health (DOH) memorandum dated August 15, 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. No comments were received from the Department of Public Works (DPW).

6. **Notice to Surrounding Owners.** A mailing list and affixed mail receipts were received by the Planning Department (Kona Office) on July 9, 2001 and August 8, 2001, respectively. For the record, it appears that the first and second notice(s) were mailed from Holualoa, HI 96725 on July 7, 2001 and August 8, 2001, respectively.

7. **Comments from Surrounding Property Owners or Public.** An objection letter received from Carolyn S. Blackburn on July 23, 2001 was forwarded to the applicant for consideration and response.

SPECIAL AND UNUSUAL CIRCUMSTANCES

In consideration of the applicant's application and findings above, a portion of the 13 year old dwelling, constructed in 1988, encroaches into a side yard and the respective side yard open space requirements. According to the Zoning Code, the subject TMK property is an "interior" lot and subject to only side yards. The bulk of the dwelling's living area and attendant roof eaves appear to be within the building envelope prescribed by the Zoning Code.

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The applicant submitted a recent survey map/site plan prepared by a surveyor that identifies the location of the existing dwelling encroachments within the affected side yard and side yard open space. The site plan denotes and identifies the distances between portions of the dwelling's (corners) wall and attendant roof eaves from the all boundary line(s). It appears that that a corner of the 2-story dwelling was inadvertently built approximately 1.4 feet into one of the property's side yards, and the corresponding open space shown between the eave corner and the side boundary line is 0.9 feet. It appears that the 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 applicant or current owner(s) to address and correct the existing building encroachments include the following actions:

1. Remove or truncate the "corners" and attendant roof eaves that encroach into the affected side yard.
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 this encroachment and the necessary changes to the attendant roof eave(s) would seem unreasonably harsh and uneconomical at this time. The removal of the existing encroachments or relocation of the dwelling 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 2-story dwelling's encroachment problem within the affected side yard.

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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.

The subject variance request does not address the location of the "1-Story Building" or other site improvements within an existing scenic easement "In favor of Lot 1-B".

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. The existing dwelling was constructed under a building permit issued by the County. It appears that the building inspections of the premises, during building construction, and throughout the life of the building permit did not disclose any encroachments into the affected yard or building irregularities. County records indicate the building permit issued by the DPW-Building Division to construct the dwelling was closed by the DPW-Building Division on December 20, 1988. The applicant and current owners are trying to resolve building encroachment problems that were disclosed after a modern survey of 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 side yard open space over 13 years ago are unique.

It appears that the commencement of building activity and the dwelling and eave encroachments built into or within that affected side yard and the respective side yard open space during 1988 were not perceptible and not physically and visually obtrusive from adjacent TMK property(s) or from the "road and utility easement". It appears the 13 year old + dwelling encroachments do not depreciate or detract from the character of the surrounding neighborhood and existing and surrounding land patterns. It appears the existing encroachment(s) within the affected side yard and side yard open space was a builder's mistake which occurred in 1988 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 the building permit 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 side yard open space will not detract from the character of the immediate neighborhood or other surrounding property within the subdivision.

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The subject variance application was acknowledged by certified letter dated August 1, 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:

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 2-story dwelling will not meet Chapter 25, the Zoning Code's minimum side yard and side yard open space requirements. The approval of this variance allows only the affected portions of a "2-story house" or dwelling constructed within that affected side yard to remain, "as-built", on the subject TMK property and shown on the site plan dated June 28, 2001.
4. This variance does not address the location(s) of other existing building improvements or site improvements within the "Existing Easement (80-Ft. Wide) For Scenic Purposes In Favor of Lot 1-B" identified on the site plan dated June 28, 2001.
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 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
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xc: Real Property Tax Office - Kona
Planning Dept. - Kona
Ms. Carolyn S. Blackburn