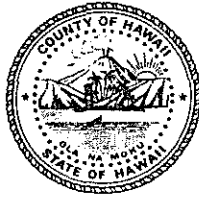


Harry Kim
Mayor



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. 1234 WH (VAR 01-054)

Applicant: KLAUS D. CONVENTZ
Owners: VIA REAL COMPANY
**Request: Variance from Minimum Yards
and Open Space Requirements,
Pursuant to Chapter 25, the Zoning Code**
Tax Map Key: 7-7-020:084, Lot 13

After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No.1234 allows portions of an existing "2 Story House" (Dwelling) and "Garage" to remain within the subject property's minimum front yard, affected side yard(s) and respective side yard open spaces, "AS BUILT", according to the applicant's site plan date June 11, 2001. The variance is from the property's minimum twenty (20) feet front yard, minimum ten (10) feet side yard, and minimum five (5) feet side yard open space requirements, pursuant to the Zoning Code, Chapter 25, Article 5, Division 7, Section 25-5-7, Minimum yards, (a) (2) (A) (B), and Article 4, Division 4, Section 25-4-44, Permitted projections into yard and open spaces, (a).

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BACKGROUND AND FINDINGS

1. **Location.** The subject TMK property, containing 11,063 square feet, is Lot 3, and is situated within the Keauhou Uka Subdivision, Unit II, at Kapalaalaea, North Kona, Hawaii. The subject property is commonly referred or described using its tax map key (TMK) number: "TMK: (3) 7-7-020:084, Lot 13". The subject TMK property is zoned Single-Family Residential (RS-10) 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 to the (Kona) Planning Department on July 9, 2001.
3. **Site Plan.** The applicant's map or site plan drawing, drawn to scale and dated June 11, 2001 was surveyed and prepared by Don C. McIntosh, LPLS. The site plan denotes and identifies the existing dwelling and garage encroachments within the minimum yards and respective open space requirements and other site improvements. The site plan identifies the building envelope prescribed by the Hawaii County Zoning Code. Portions of the existing "2 Story House" and "Garage" were constructed within the property's minimum yards and open space requirements stipulated by the Zoning Code.

In addition, the site plan, dated June 11, 2001, denotes and identifies the location of other site improvements. Any wall or other boundary encroachment issues shall be addressed by the applicant or between respective property owner(s) of the lots identified on the site plan.

The presence and location of an existing cesspool or Independent Wastewater System (IWS) was not denoted or disclosed on the variance application's site plan submittal dated March 6, 2001.

4. **Building Permit(s).** County permit records indicate that DPW-Building Division's building (906481, K07572), electrical (EK06919), and plumbing (MK05745) permits were closed.

5. **Agency Comments and Requirements.**

- a. The applicant submitted a copy of "**REAL PROPERTY TAX CLEARANACE**" dated June 25, 2001 states in part the following:

"TMK(s): (3) 7-7-20:84"

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

Reference: NDIC"

In view of the applicant's submittal, no further written comments were received from the County's Real Property Tax office.

- 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 oral or written comments were received from the Department of Public Works (DPW).

6. **Notice to Surrounding Owners.** The applicant submitted proof of mailing or good faith efforts to serve notice(s) of the variance application to the designated surrounding property owners and lessees on the applicant's list. For the record, it appears that the first and second notice(s) were mailed on July 7, 2001 and August 8, 2001, respectively.

7. **Comments from Surrounding Property Owners or Public.** No oral or written comments or objection letters were received.

SPECIAL AND UNUSUAL CIRCUMSTANCES

In consideration of the applicant's submittals and findings above, it appears that the dwelling and other site improvements were constructed between June 1986 and January 1987. Portions of the dwelling encroach into the property's minimum front, respective side yard(s) and side yard open space requirements, according to Chapter 25, the Zoning Code. The bulk of the 2-story dwelling's living area and attendant roof eaves are within the building envelope prescribed by the Zoning Code and meet minimum yard(s) and open space requirements.

The applicant submitted a recent survey map/site plan prepared by a surveyor, which identifies the location of the existing dwelling encroachments within the affected yard(s). The site plan denotes and identifies distances between the dwelling's wall and the respective boundary line(s). Portion of the dwelling was built 0.5 feet into a front yard and 1.9 feet into a side yard. It appears that the previous and 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 and current owner(s) to address and correct the existing building encroachments include the following actions:

1. Remove the dwelling encroachments and modify the attendant roof eaves that encroach into the respective yard(s).
2. Redesign and relocate the existing dwelling and garage 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 encroachments modifying the attendant roof eave(s) to meet all yard requirements 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.

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No evidence has been found to show indifference or premeditation by the applicant or past/current owner(s) to deliberately build or intentionally allow the building encroachment problems to occur. The applicant and current owner(s) submitted the variance application to address and resolve the dwelling's encroachment problem within the affected yard(s).

The Planning Department acknowledges there may be other design or building alternatives available to the applicant and current 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.

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 building permits issued to previous owner(s) 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 yards or any other building irregularities. The building permit issued by the DPW-Building Division to construct the dwelling and attached garage were closed by the DPW-Building Division together with other associated electrical and mechanical permits issued. The applicant and current owners are trying to resolve the building encroachment issues that were disclosed after a modern survey of the existing TMK property was performed and a map of existing TMK property was prepared.

It appears that the commencement of building activity and the dwelling encroachments built into or within that affected yard(s) during 1986/1987 were not perceptible and not physically and visually obtrusive from adjacent TMK property(s) or the rights-of-way. It appears the 15 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 yards was a contractor or builder's mistake which occurred in 1986 or a misinterpretation of the minimum building yards or boundary line(s) by the previous owner or owner's builder. Inspection of the TMK property during the life of the building, electrical, and mechanical permits 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 the front and respective side yard 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 and submittals were submitted to the Kona Planning Department Office and acknowledged by certified letter dated August 1, 2001. The applicant/owner(s) 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 dwelling encroach into the property's front and side yard(s) required by Chapter 25, the Zoning Code. The approval of this variance allows the dwelling and garage encroachments within the affected yards and identified on the applicant's site plan dated June 11, 2001, to remain, "AS BUILT", on the subject TMK property.

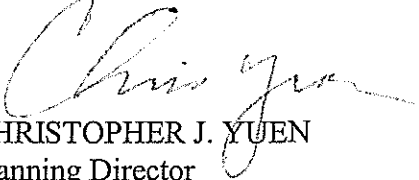
The subject TMK property is subject to language and stipulations recited in a Agreement dated June 4, 1986 recorded on June 12, 1986 in Liber./Pg. 19577 599 at the State of Hawaii Bureau of Conveyances.

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.

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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
P:\WP60\WRY\FORMLETT\VARAPPTMK77020084.BC

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