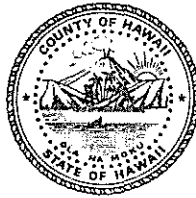


Harry Kim
Mayor



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

October 23, 2001

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

Dear Mr. Conventz:

VARIANCE PERMIT NO. 1235 WH(VAR 01-055)

Applicant: KLAUS D. CONVENTZ
Owners: LIGEA PAINTER, ET AL.
Request: Variance from Minimum Yards
and Open Space Requirements,
Pursuant to Chapter 25, Zoning

Tax Map Key: 7-7-003:049, Lot 1

After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No. 1235 allows portions of a dwelling's garage to remain, "AS BUILT", with a minimum 14.7 feet side yard and minimum 8.5 feet side yard open space between the roof eave and side boundary line according to the applicant's site plan dated/signed on June 26, 2001. The variance is from the Minimum yards and Open space requirements, pursuant to the Zoning Code, Chapter 25, Article 5, Division 5, Section 25-5-56, Minimum yards, (2), and Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open spaces.

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BACKGROUND AND FINDINGS

1. **Location.** The subject property containing 25,597 square feet is Lot 1 of the Puu Wai Alii Estates, being a portion of R. P. 7289 L. C. Award 7228 to Loe, at Holualoa 4th, North Kona, Hawaii, and commonly referred to by a Tax Map Key number, TMK: (3) 7-7-003:049.

The subject TMK property is zoned Residential and Agricultural Districts (RA-.5a) by the County and designated Rural "R" by the Land Use Commission (LUC).

2. **Variance Application.** The applicant submitted the variance application on July 11, 2001 to the Planning Department (Kona).
3. **Variance Application-Site Plan.** The applicant's site plan drawing, drawn to scale and dated June 26, 2001, was certified by Kevin McMillen, LPLS. This site plan identifies the location of the dwelling, garage, roof awnings, and other site improvements.

Note: The site plan also identifies and denotes the location of existing retaining walls within the subject TMK property and location of the concrete driveway access. Any wall or fence encroachment problems shall be addressed by the applicant or owner(s). Furthermore, the presence and location of an existing cesspool(s) or Individual Wastewater System(s) (IWS) were not denoted or identified on the applicant's site plan submittal.

4. **Building Permit Records.** A copy of the approved original detailed building construction plans to construct the existing dwelling(s) and other site improvements on the property were not submitted with the variance application.

Note: Any free-standing walls, planter "box" or other perimeter wall features, which are less than six (6) feet in height, respectively; and, located on and within the subject property or along the common boundary lines require any building permit(s) from the DPW. Any existing wall improvements and planter box encroachments within Puu Waialii Drive right-of-way must be addressed by the applicant/current owner(s) and removed prior to any further transfer in property title. Other fence or stonewall encroachments straddling common boundary lines shared with surrounding TMK parcels must be addressed by the applicant or between 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 July 11, 2001 which states in part:

"This is to certify that Painter, JK/LM Survivor Tr (owner of record) has paid all Real Property Taxes due the County of Hawaii up to and including 6/30/2001."

- b. The State Department of Health (DOH) memorandum dated August 15, 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."

- c. The Department of Public Works (DPW) memorandum dated September 4, 2001, states in part:

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

Please refer to the attached Building Division comments dated August 27, 2001.

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

The attached DPW memorandum dated August 27, 2001 states in part the following:

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

Electrical permit #E02921 for the subject dwelling was never finalized."

Pursuant to further discussion with the DPW-Building Division (Kona) and building permit records, it appears that Electrical Permit #E02921 was finalized on March 3, 1979.

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6. **Notice to Surrounding Property Owners.** Proof of mailing a first and second notice was submitted to the Planning Department on July 11, 2001 and August 8, 2001, respectively. For the record, the first and second notice(s) were mailed from Holualoa, HI, 96725, on July 11, 2001 and August 8, 2001, respectively.
7. **Comments from Surrounding Property Owners or Public.** No written comments or objections to the variance request were received by the Planning Department.

SPECIAL AND UNUSUAL CIRCUMSTANCES

It appears that the building encroachment problems within a side yard was discovered during a pending sale of the subject property and identified on a recent site plan map prepared by a licensed surveyor identifying the dwelling and other "as-built" improvements. The applicant submitted a copy of this survey map/site plan that identifies the location of the existing dwelling and other site improvements within the affected side yard. The site plan identifies the distance between portions of the dwelling and attendant roof eaves from the affected side boundary line(s). Portions of the existing dwelling were constructed into the minimum fifteen (15) feet side yards and respective ten (10) feet open side yard space requirements. It appears the previous and current owner(s) were unaware of the dwelling's encroachment problem within the affected side yard and minimum side yard open space requirements of the Zoning Code.

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:

1. Removing a portion of the existing garage encroachments and attendant roof eaves that encroach within the affected side yard and open space.
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.

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To require or impose removal of the garage encroachment and attendant roof eave(s) constructed by the previous owner(s) may disrupt the overall dwelling's structural integrity and the relationship between existing structures on the site and the present driveway location.

The applicant, on behalf of the current owner(s), is trying to address and 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 previous owner(s) to deliberately create or intentionally allow the building encroachment problems to occur.

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 and uneconomical 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, pool, breezeway, and attached garage were constructed under valid building permit(s) issued to the previous owner(s). It appears that the building inspections by the DPW of the premises, during building construction and throughout the life of the building permit(s) did not disclose any building encroachments, setback irregularities, and any outstanding building permit deficiencies. The applicant and current owner(s) became aware of the encroachment problems during escrow (DROA) to sell/purchase the property. The applicant and current owner(s) 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 and established within that affected side yard and open space requirements on the subject property are unique.

It appears that existing building encroachments into the affected yard(s) and respective open spaces are not physically and visually obtrusive from adjacent property(s) or the existing 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 (garage) encroachment(s) within those yards and open spaces were building mistake(s) or misinterpretation of the minimum building yards or boundary line(s) by

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the previous owner's contractor. It appears that building inspections 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 or outstanding permit problems. Therefore, it is felt that the existing dwelling encroachments within the affected side yard and corresponding side yard open space requirements will not detract from the character of the immediate neighborhood or the subdivision.

The subject variance application was acknowledged by certified letter dated August 1, 2001. Additional time to allow the Planning Director to review the variance request and address agency comments was required.

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:

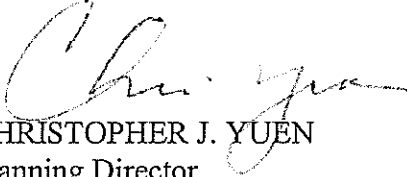
1. The applicant/owner, their assigns or successors shall be responsible for complying with all stated conditions of approval.
2. The applicant/owner(s), successors or assigns shall indemnify and hold the County of Hawaii harmless from and against any loss, liability, claim, or demand for the property 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 dwelling's garage and attendant garage roof eaves will not meet Chapter 25, the Zoning Code's, minimum side yard and open space requirements. The approval of this variance allows the existing dwelling(s) and permitted building improvements identified a site plan submitted with the variance application, dated/signed June 26, 2001, to remain on the subject TMK property.
4. No variance from Chapter 25, the Zoning Code or Chapter 23, Subdivisions shall be granted to permit an ohana dwelling on the subject TMK property.

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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.

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\VARAPPTMK77003049.BC

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