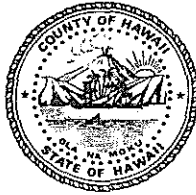


Harry Kim
Mayor



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

March 12, 2002

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

Dear Mr. Conventz:

VARIANCE PERMIT NO. 1267 WH (VAR 01-090)

Applicant: KLAUS D. CONVENTZ
Owner: JOHN L. KINMAN, ET AL.
Variance from Minimum Yards,
Pursuant to Chapter 25, Zoning
Tax Map Key: 7-7-003:051, Lot 3

After reviewing your application, site plan, and the information submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No. 1267 allows portions of a dwelling, porte-cochere (covered parking), and shed, encroaching into the Lot 3's minimum yards and open space requirements to remain, "AS BUILT", pursuant to the site plan dated December 5, 2001. The porte-cochere is approved to remain with a 6.0 feet +/- front yard and attendant 4.0 feet +/- front yard open space requirements, respectively, in lieu of the minimum 25 feet front yard and 19 feet front yard open space requirements. The dwelling is approved to remain with a 21.9 feet rear yard and 17 feet rear yard open space requirements, respectively, in lieu of the minimum 25 feet rear yard and 19 feet rear yard open space in lieu of the minimum 25 feet rear yard and 19 feet rear yard open space requirements. The shed is approved to remain with a 19.5 rear yard and 9.8 feet side yard and the 9.8 feet side yard open space, respectively, in lieu of the minimum 25 feet rear yard and minimum 15 feet side yard and attendant 10 feet side yard clear space requirements. The variance request is from Lot 3's minimum front yard, rear yard, side yard, and attendant open space requirements, pursuant to the Zoning Code, Chapter 25, Article 5, Section 25-5-56, Minimum yards, (1) (2), and Division 4, Section 25-4-44, Permitted projections into yards and open spaces, (a).

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BACKGROUND AND FINDINGS

1. **Property Location and Zoning.** The subject property, Lot 3 consisting of 22,322 square feet within the Puu Wai Estates, is a portion of R.P. 8289, L. C. Award 7228 to Loe, and is situated at Holualoa 4th, North Kona, Hawaii.

The 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/Applicant's Explanation-Request.** The applicant submitted the variance application, site plan, supplemental information, tax clearance, and \$250.00 filing fee on December 11, 2001. Additional information and discussion to address the porte-cochere location was received on March 7, 2001.

3. **Variance Application-Site Plan.** The applicant's map or site plan drawing, drawn to scale, was surveyed and prepared by Kevin McMillen, LPLS. The site plan, dated and signed December 5, 2001 identifies the location of the dwelling and porte-cochere building, detached shed building, and building (setback) line(s) indicating the limit and defining the area where buildings or structures may not be built. Portions of the dwelling and attached porte-cochere and the shed encroach into the front yard, rear yard and side yards, and the associated open space requirements.

In addition, the site plan identifies CRM walls, stonewalls, and other site improvements. Portions of these walls straddle Lot 3's boundary lines and encroach into adjoining property. These CRM wall and stonewall encroachments less than six (6) feet in height may not require any building permit(s). However, these wall encroachments or other site and landscaping improvements constructed beyond the property's boundary lines should be addressed and resolved between the applicant and the affected parties or between legal property owner(s).

The site plan does not denote location or identify any existing cesspool(s) or Individual Wastewater System(s) (IWS).

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4. **Building Permit Records.** The copy of the approved original detailed building construction plans to construct existing dwelling/porte-cochere building and detached shed building were not submitted with the variance application.

The applicant shall confer with the Department of Public Works (DPW-Kona)-Building Division and other affected agencies to address and comply with all outstanding building issues and construction permits. The applicant or current owners shall confer with the DPW-Building Division to close any outstanding building permits and comply with variance conditions and agency requirements.

5. **Agency Comments and Requirements.**

- a. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated December 10, 2001 stating:

"TMK(s): (3) 7-7-003-051"

"This is to certify that John L. Kinman (owner of record) has paid all Real Property Taxes due the County of Hawaii up to and including Dec. 31, 2001."

- b. The State Department of Health (DOH) memorandum dated January 2, 2002, 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 January 22, 2002, states in part:

"We have reviewed the subject application forwarded by your memo dated December 18, 2001 and oppose the approval of the application for the reason noted below.

Building permit no. 885800 for the subject dwelling was never finalized.

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Please refer questions regarding the permit to the Building Division."

6. **Notice to Surrounding Property Owners.** Proof of mailing a first and second notice was submitted to the Planning Department (Kona Office) on December 11, 2001 and December 21, 2001, respectively, by the applicant.
7. **Comments from Surrounding Property Owners or Public.** No further agency comments or written objections from surrounding property owner(s) or public to the variance application were received.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant submitted a recent survey map/site plan and written explanation which states in part:

"Owners were unaware of any problems until a survey, conducted by KKM-Surveys on December 5, 2001, revealed several encroachments, which were obviously caused by a staking error by the predecessors' contractors (in the case of the dwelling), and a misunderstanding of codes (in the case of the shed)."

The previous owners constructed the dwelling and swimming pool between 1977 and 1988 under 3-building permits. Building inspections of the improvements between 1977 and 1988 did not cite any building violations. The shed's location permitted in 1995 and subsequent alterations to enclose the shed further expanded existing building setback and open space encroachment issues.

Therefore, considering the background and present 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 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. Alternatives available to the applicant or owner to address or correct the existing building

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encroachments include the following actions:

1. Removing the existing building encroachments and modifying the attendant roof eaves that encroach into the affected yards.
2. Redesign and relocate the dwelling and shed to fit within the correct building envelope prescribed by the Zoning Code and/or other design and remedial building alternatives.
3. Consolidate Lot 3 with the adjacent lot (rights-of-way) to expand the lot's size and redefine the property area and minimum building lines to accommodate existing building locations.

To require or impose removal of the existing dwelling/porte-cochere, and shed encroachments and modifying the attendant roof eave(s) within the affected yards would seem unreasonably harsh and uneconomical at this time. The removal of the dwelling encroachments or relocation of dwelling may disrupt the dwelling's structural integrity, change internal room lighting and air circulation, and severely change the building's overall building geometry and exterior building character. The shed building is not a living space and was originally designated a "garden-shed" according to a site plan extract submitted by the applicant. The applicant did not pursue the consolidate/resubdivision option with the road right-of-way and adjoining property(s).

No evidence has been found to show indifference or premeditation by the applicant and current owners 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 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 shed building(s) were

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constructed under a series of building permit(s) issued to previous owner(s) and current owners the subject TMK property. The building records or building inspection records were not submitted with the application. It appears that before the modern survey was performed, the current owners were not aware of the severity of the building encroachment issues or setback irregularities. It appears that the current owners were made aware of the encroachment problems after they purchased the property. The applicant on behalf of the current owner(s) is trying to resolve the property's encroachment problems created by a misinterpretation of the boundary line(s) or placement of the building improvements.

It appears that existing building encroachments into the affected yards and respective open space requirements required by the Zoning Code 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(s) (dwelling/porte-cochere and shed) encroachment(s) within that affected yard were cumulative building mistakes or misinterpretation of the minimum building yards or boundary line(s) by the builder or previous owner(s). Inspection of the property during the life of the building permit(s) issued by the County or other agencies are not submitted with the variance application and there are no records or building citations addressing the existing building encroachment problem(s) or setback issues. Therefore, it is felt that the existing dwelling improvements/encroachments will not detract from the character of the immediate neighborhood or the subdivision.

The subject variance request and application was acknowledged by letter dated December 18, 2001. Subsequent building information was submitted on March 7, 2002 by the applicant to identify the location of the porte-cochere and other parking issues for further consideration by the Planning Director. Additional time to allow the Planning Director to consider the porte-cochere location and agency comments was required. The applicant, on behalf of the owners agreed to an extension of time to March 22, 2002 to render a decision on the subject variance request.

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.

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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 dwelling and attached porte-cochere and the detached shed building denoted on the applicant's site plan dated December 5, 2001 will not meet the minimum yards and associated open space requirements required by Chapter 25, of the Hawaii County Zoning Code. The approval of this variance is limited only to the portions of the dwelling/porte-cochere and shed encroachments within the affected yards. The approval of this variance does not address any other dwelling encroachment issues or wall and/or landscape encroachment issues on Lot 3 or adjoining TMK property(s).
4. The applicant shall contact the DPW-Building Division to address and satisfy building permit no. 885800 and any outstanding building permits issued by the DPW-Kona Office issued to the subject TMK property. All building permits issued to the subject TMK property and any further correction or construction permits issued to the subject TMK property shall be "finaled" or closed by the DPW-Building Division prior to the sale of the subject TMK property or change in title.
5. No permit to allow an ohana dwelling or building permit issued to construct an "ohana" dwelling shall be granted to the subject TMK property, subject to provisions of the Zoning Code or State Law, which may change from time to time.

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6. 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

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