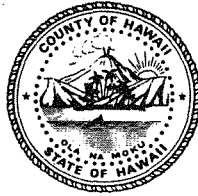


Harry Kim
Mayor



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 2905 2625

July 17, 2001

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

Dear Mr. Conventz:

VARIANCE PERMIT NO. 1216 WH(VAR 01-013)

Applicant: KLAUS D. CONVENTZ
Owner: EDWARD A. SILVER TRUST
**Request: Variance from Minimum Yards
and Open Space Requirements,
Pursuant to Chapter 25, Zoning**
Tax Map Key: 7-5-029:013, Lot 83

After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No. 1216 allows portions of the existing dwelling, enclosed lanai, and attendant roof eaves identified on a site plan dated January 25, 2001 to remain on subject TMK property "AS BUILT". The variance request is to allow the existing dwelling, enclosed lanai, and respective roof eave improvements to remain with a minimum 14.7 feet front yard and minimum 14.6 feet rear yard in lieu of the minimum 15 feet front and rear yards, and corresponding 9.0 feet open space from the front and rear boundary line(s), in lieu of the minimum 10 feet clear space requirement, respectively, and, a minimum 7.8 feet side yard and corresponding 3.7 feet open space from that respective side boundary line, in lieu of the minimum 8 feet side yard and 4 feet open space requirements, respectively. The variance request is from the Zoning Code, Chapter 25, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), and Section 25-5-77, Other Regulations, and Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open spaces.

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BACKGROUND AND FINDINGS

1. The subject property containing 8284 square feet is Lot 83, Kona Heights, Unit II, File Plan 1077, at Hienaloli 5th. and 6th., North Kona, Hawaii.

The property is zoned Agricultural (A-5a) by the County and designated Urban "U" by the Land Use Commission (LUC). The property's land area is below the minimum 5 acre lot size area required for the A-5a zone designation and is therefore deemed "non-conforming".

2. The applicant submitted a variance application to the Kona Planning Department on January 29, 2001. The variance included an attached an explanation dated January 27, 2001, "SPECIAL & UNUSUAL CIRCUMSTANCES", that states in part:

"The dwelling was built and completed in 1980 under building permit no. 03744, finalized June 19, 1980.

Owner was unaware of any problem when a survey conducted by KKM-Surveys revealed on January 25, 2001 various small encroachments of yards and open space, obviously caused by staking error of predecessor's in property contractor (sic). In fact, the violations are rather based on mathematical errors, when the house was planned. While the rough-in dimensions of the residence may have fit into the envelope, the siding and corner trims did not. However, the survey map shows clearly that every effort had been made to place the improvements properly, and that there is no evidence that intentional mistaking based on malice was involved.

The violations are miniscule, ranging from 2.4 to 4.8 inches in the setback, and in extremis to 12" in the case of clear space. Any structural correction would be extremely costly, and beyond the financial means of the owner, while the violations are visually not perceptible from neighbor lots or public areas, while otherwise the provisions of Section 25-2-51 would fully apply."

3. The site plan drawing, drawn to scale by Kevin McMillen, LPLS, and certified on January 25, 2001, identifies the location of the existing dwelling, enclosed lanai, and other existing site improvements on LOT 83. The site plan identifies the building envelope within dashed lines prescribed by the Zoning Code and denotes distances between the building and the respective boundary lines.

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Note: The site plan identifies the location of existing CRM Walls, Chain Link Fence(s), Wooden Fence(s), Deck, exterior walkway/stairway, and concrete driveway on and within the subject TMK property (LOT 83) and on adjacent (LOTS) property(s).

Furthermore, the presence and location of a cesspool or Individual Wastewater System (IWS) on the property was not denoted or identified on the site plan submitted by the applicant.

4. A copy of the approved original site plan and detailed building construction plans to construct the existing dwelling and other site improvements on the property in 1980 were not submitted with the variance application.

Note: Any existing and free-standing perimeter CRM walls, chain link fences, wooden fences, and retaining walls, less than six (6) feet in height located on and within the subject TMK property may not require any building permit(s) from the Department of Public Works (DPW). The subject variance request does not address the location of the existing CRM wall(s), fence(s), other boundary encroachments, and building permit issues that may arise due to the location of existing walls, fences, and other encroachments built on the subject TMK or adjacent TMK property lines, pursuant to the site plan submittal. Encroachment issues within the right-of-way and on the subject TMK property must be resolved between the DPW and the applicant and between respective property owner(s).

5. The applicant submitted a copy of "REAL PROPERTY TAX CLEARANCE" dated January 29, 2001 stating:

"This is to certify that Edward A. Silver (Owner-of-record) has paid all real property taxes due the County of Hawaii up to and including "12-31-2000"

6. The State Department of Health (DOH) memorandum dated April 3, 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."

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7. The Department of Public Works (DPW) memorandum dated April 9, 2001, states in part:

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

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

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

The attached DPW memorandum dated March 27, 2001, state in part:
"We oppose the approval of the application for the reasons noted below.

The EK03867 permit for the subject dwelling was never finalized."

8. Proof of mailing a first and second notice was submitted to the Planning Department on January 29, 2001 and March 22, 2001, respectively. For the record, it appears that the first and second notice was mailed from Holualoa on January 29, 2001 and March 22, 2001, respectively, by the applicant.

It appears that no oral or written objections to the variance request were received by the Planning Department.

SPECIAL AND UNUSUAL CIRCUMSTANCES

In view of the above, the building encroachment problems were discovered during the sale of the subject property. The applicant submitted a recent survey map/site plan that identifies the location of the existing dwelling and other site improvements. The site plan identifies the distance between portions of the dwelling and attendant roof eaves from the affected boundary line(s). Portions of the existing dwelling, enclosed lanai, and the attendant roof eave(s) were constructed into minimum yards and respective open space requirements of the Hawaii County Zoning Code. It appears that the previous and current owner(s) were unaware of the building encroachments within the affected front, rear, and side yard(s).

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 deprives the current owner(s) 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 TMK property.

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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 owner(s) to address and correct the existing building encroachments include the following actions:

1. Removing portions of the dwelling and attendant roof encroachments within the affected yards and open spaces.
2. Redesign and relocate portions of the existing dwelling and lanai 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 "corners" and affected eaves constructed by the previous owner(s) or the contractor/builder would seem unreasonably harsh and uneconomical at this time. The removal of the building encroachments and roof eaves would disrupt the dwelling's structural integrity, internal room circulation, and change the building's overall exterior character.

No evidence has been found to show indifference or premeditation by the applicant/owner(s) to deliberately create or intentionally allow the building encroachment problems to occur. The applicant submitted the variance application on behalf of the owner(s). Other wall encroachment problems between respective property(s) will be addressed and resolved by the applicant and respective owner(s).

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.

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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 valid building permit(s) issued to the previous owner(s). 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 building encroachments or setback irregularities. The applicant and current owner(s) became aware of the encroachment problems during escrow to sell the property. The current owner(s) are trying to resolve several 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 on the property are unique. The existing building encroachments have been built within those affected yards and respective open spaces on this non-conforming sized TMK property.

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 (dwelling) encroachment(s) within those yards and open spaces were building mistake(s) which occurred over 20 years ago or were a cumulative misinterpretation of the minimum building yards or boundary line(s) by the contractor/builder or previous owner(s). 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 the multiple building encroachment problem(s) or reveal and disclose any irregular building setback problems. Therefore, it is felt that the existing dwelling encroachments within said yards and open spaces will not detract from the character of the immediate neighborhood or the subdivision.

The subject variance application was acknowledged by certified letter dated March 20, 2001. Additional time to allow the Planning Director to understand and address agency comments was required. The applicant agreed to extend the date on which the Planning Director shall render a decision on the subject variance application.

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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VARIANCE DECISION AND 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, 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 and roof eaves will not meet Chapter 25, the Zoning Code's, minimum yard and open space requirements. The approval of this variance allows the existing dwelling and permitted building improvements identified a site plan submitted with the variance application, dated January 25, 2001, to remain on the subject TMK property. The applicant is required to confer with the Department of Public Works (DPW) and address and close the EK03867 permit prior to any future sale or change in property ownership or title.


The applicant shall submit proof to the Hawaii County Planning Department that the requirements of EK 03867 permit have been satisfied and closed by the DPW prior to the pending sale or change in property ownership or title.

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.
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.

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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