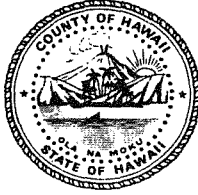


Harry Kim
Mayor



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 2618

July 17, 2001

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

Dear Mr. Conventz:

VARIANCE PERMIT NO. 1217 WH(VAR 01-014)

Applicant: KLAUS D. CONVENTZ
Owners: WALTER & MARILYN CASSELL
Request: Variance from Minimum Yards
and Open Space Requirements,
Pursuant to Chapter 25, Zoning

Tax Map Key: 6-4-026:031, Lot 53

After reviewing your variance application and information submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No. 1217 allows the portions of an existing dwelling to remain on the subject TMK property "AS BUILT", pursuant to a site plan dated October 26, 1999. The building encroachments are permitted to remain with a minimum 15.47 feet rear yard and minimum 11.82 open space from the respective rear property line in lieu of the minimum 20 feet rear yard and minimum 14 feet open space requirement, respectively. The variance request is from the Zoning Code, Chapter 25, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), 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 15,005 square feet is Lot 53, Pu'u Nani Subdivision, Unit 4, Waimea, South Kohala, Hawaii.

The property is zoned Agricultural (A-1a) by the County and designated Agriculture "A" by the Land Use Commission (LUC). The property's land area is below the minimum one (1) acre required for the A-1a zone designation and is therefore deemed "non-conforming".

2. The applicant submitted the subject variance application which includes an explanation, "SPECIAL & UNUSUAL CIRCUMSTANCES", dated January 31, 2001, with the subject variance application. This explanation states in part:

"The 2-story dwelling was built under permit nos. 885617 & 896361 in 1988/1989.

The Cassells were unaware of any problem when a survey by Niels Christensen revealed the encroachment of the 1-story lanai/livingroom area into the rear yard on October 26, 1999. Although the violation of the setback is 4.53 feet, it's limited to the Northwest corner only, while the deck encroaches 2.18 feet into the open space. The deck addition is at ground level only, thus mitigating the negative impact this encroachment may have had which is unsuitable for building purposes, and wide open brush land and drainage ditch. In addition there is no evidence of malice or intent, but a honest staking error, which did not benefit owner or contractor.

Any structural correction measure would be extremely expensive, and violation is not visually perceptible from public view or neighbor lots, while also the provision of Section 25-2-51 would fully apply in this case."

3. The site plan drawing, drawn to scale by Niels Christensen, LPLS, and dated October 26, 1999, identifies the location of the existing dwelling and other site improvements on the subject TMK property (LOT 53).

Note: The site plan identifies and denotes the location of an existing rock wall on and within the subject property and "outside" the subject TMK property(s) or LOT 53's boundary line(s).

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

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

Note: Any existing and free-standing perimeter rock wall which is/are less than six (6) feet in height, and, located on and within the subject property or along the common boundary lines may not require a building permit(s) from the Department of Public Works (DPW). However, any existing perimeter rock wall straddling the boundary line(s) or encroachments within the rights-of-way or adjacent property(s) must be addressed and resolved by the applicant or between the 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 Cassell Trust (Owner-of-record) has paid all real property taxes due the County of Hawaii up to and including June 30, 2001"

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."

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

"We have reviewed the subject application and have no comments.

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

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8. Proof of mailing a first and second notice was submitted to the Planning Department on January 31, 2001 and March 22, 2001, respectively. For the record, it appears that the first and second notice was mailed from Holualoa on January 31, 2001 and March 22, 2001, respectively, by the applicant.

SPECIAL AND UNUSUAL CIRCUMSTANCES

It appears that the building encroachment problems were discovered after a modern survey was prepared for the owner(s). The applicant submitted a copy of the recent survey map/site plan that identifies the location of the existing dwelling and other site improvements. The site plan denotes and identifies distance(s) between portions of the dwelling and the wood deck and the rear boundary line. Portions of the existing dwelling and wood deck were constructed within the minimum 20 feet rear yard and minimum 14 feet open space requirements. It appears the previous and current owner(s) were unaware of the building encroachment problem.

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

At this time, 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 the triangular shaped encroachment and attendant wood deck and roof eaves within the affected rear yard and respective open space.
2. Redesign and relocate portions of the existing 2-story dwelling and wood deck 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 encroachment, wood deck, and attendant roof eaves constructed by the previous owner(s) or builder would seem unreasonably harsh and uneconomical at this time. The removal of the building encroachments and roof eaves may disrupt the 2-story dwelling's structural integrity, the internal circulation between the first and second floors, and change the building exterior building character.

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No evidence has been found to show indifference or premeditation by the past or current owner(s) to deliberately plan and construct the building improvements within the minimum rear yard and minimum open space requirement or intentionally allow the building encroachment problems to occur. The applicant submitted the variance application on behalf of the owner(s) to address and resolve the building encroachment problem. The rock wall encroachments or portions of the rock wall outside the property boundary(s) lines 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 current owner(s) and applicant 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 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 after a modern survey of the property was completed. The current owner(s) are trying to resolve building encroachment problems that were disclosed after a modern survey map was presented to the current owner(s)/applicant.

The circumstances which permitted the existing building improvements to be built on the property are unique. The existing building encroachments have been built within that affected yard and respective open space on this non-conforming sized property (lot).

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 the rear yard and open space were building mistake(s) which occurred over 12 years ago or were a cumulative misinterpretation of the minimum building yards or boundary line(s) by the 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 any building encroachment problem(s) or reveal

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and disclose any irregular building setback problems. Therefore, it is felt that the existing dwelling encroachments within the rear yard and affected 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.

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

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 and roof eaves will not meet Chapter 25, the Zoning Code's, minimum rear yard and open space requirements. The approval of this variance allows the existing dwelling, wood deck, and the attendant roof eave encroachments identified on the site plan, dated October 26, 1999, to remain on the subject TMK property.

The approval of this variance does not endorse or approve the location of the existing rock wall or any or other encroachments on LOT 54 or other TMK property(s) or Lots identified shown on the variance application's site plan dated October 26, 1999.

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4. Future building improvements to or within the existing dwelling and permitted uses of the dwelling/premises 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.

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