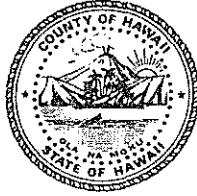


Harry Kim
Mayor



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 0768

October 11, 2002

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

Dear Mr. Conventz:

VARIANCE APPLICATION WH (VAR 02-023)

VARIANCE FILE NO. 1327

Applicant: KLAUS D. CONVENTZ

Owner: ALAN K. BREMER

**Request: Variance from Minimum Yards
and Open Space Requirements,
Pursuant to Chapter 25, the Zoning Code**

Tax Map Key: (3) 7-8-006:015

After reviewing your application and the information submitted, the Planning Director is denying your variance request to allow building improvement positions consisting of a "Dwelling Over Garage-Deck" and "Water Tank", "AS BUILT", to remain on the property. A third water tank, identified as "Water Tank-Eave". "AS BUILT", straddling a common boundary line shared with an adjoining lot ("LOT 10-A") will be demolished and removed. It appears that some of dwelling and water tank improvements and other building improvements were constructed on the property by previous property owner(s) without agency approval or necessary construction and building permits. The applicant, on behalf of the new or current owner, submitted the variance request from the property's minimum yard requirements pursuant to 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, in order to apply for "after-the-fact" building permits from the Department of Public Works (DPW).

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BACKGROUND AND FINDINGS

1. **Location.** The subject property, consisting of 1.2 acres +/-, is an Easterly Portion of Royal Patent 6367, Land Commission Award 7361:3 to Kauipui, and situated at Keauhou 1st, North Kona, Hawaii.

The property is zoned Agricultural (A-5a) by the County and designated Urban "A" by the Land Use Commission (LUC).

2. **Variance Application.** The applicant submitted the variance request and application to the Kona Planning Department on or about April 19, 2002. The May 7, 2002 acknowledgment letter indicates that an adjoining property owner(s) were concerned about access issues, building encroachment issues, and past abuses of the County Codes or building laws.

3. **Variance Application-Site Plan.** The variance site plan or survey map showing the entire parcel is dated and signed by a surveyor on May 2, 2002. The "complete" variance site plan map prepared by KKM Surveys was submitted to the Planning Department after the variance application was filed at the Kona Planning Department office. The survey map shows the entire property and denotes the severity of the building encroachments and the water tank encroachment upon an adjoining property. According to the applicant's statement, portions of the dwelling improvements and water tank(s) were constructed by the previous owners. It appears that the builders ignored the minimum yard requirements and location of common boundary line(s).

4. **Building Permit Record.** The applicant states in part the following:

"Pending a subsequent application for remodeling, the County discovered various permit inconsistencies, and that part of the structure needed additional permits."

The Property Tax Office record already shows improvements before 1961, but no information concerning the building permits(s) could be found."

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Note: It appears that the applicant is seeking an "after-the-fact" building permits from the Department of Public Works (DPW)-Building Division and permission from other affected agencies to permit building improvements constructed after 1961. Please refer to the DPW comments and other findings cited below.

5. **Agency Comments and Requirements WH (VAR 02-023):**

- a. The State Department of Health (DOH) memorandum dated May 21, 2002, 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."

- b. The Department of Public Works (DPW) memorandum dated May 21, 2002, states in part:

"We have reviewed the subject application and offer the following comment:

1. Please refer to the attached Building Division comments dated April 18, 2002.

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

The attached DPW memorandum dated April 18, 2002 states in part the following:

"We oppose the approval of the application for the reasons noted below.

The Electrical #E975894 and #EK04707 permit for the subject dwelling was never finalized.

Others: See enclosed Building, Electrical & Plumbing Permits for the above mentioned TMK."

Reference to the following building permit records or extracts received concerning or issued to subject TMK:

EK04707, EK04783, M935558, M96551, and MK03356.

6. **Notice to Surrounding Property Owners.** Proof of mailing a first notice and second notice to the surrounding property owners, respectively, were received by the Planning Department. It appears that a first notice and second notice(s) were mailed on April 19, 2002 and May 16, 2002, respectively, by the applicant.
7. **Comments from Surrounding Property Owners or Public.** Several telephone calls strongly objecting to the variance application and letters from the adjoining property owners citing concerns about the nature of the applicant's variance request, past abuses of building laws, and objections to the subject variance application were received. The following letters were received:
 - a. Several telephone calls from adjoining property owner-John D. Weeks, II, Et al., (TMK: (3) 7-8-006:063) strongly objecting to the variance application citing other boundary encroachment issues and concerns about past abuses of County building and Zoning laws. A letter, dated May 23, 2002, concerning the driveway and easement issue was sent by Mr. Weeks and includes a map and easement description.

Note: For the record Mr. Weeks accompanied Planning Department staff during a recent field inspection of the subject property to show the easement and driveway encroachment issues and spoke about the other boundary concerns and issues affecting the surrounding property owners.
 - b. Letter from Herbert H. Okano, dated May 1, 2002, citing concerns about building position and other County requirements.
 - c. Objection letter from L. Kaiulani Weeks dated May 20, 2002.
 - d. Objection letter from Elizabeth Puaa dated May 14, 2002.
 - e. Objection letter from Robert P. Hickcox (Representing the Estate of Virginia Haanio), dated June 3, 2002.

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Note: Mr. Hickcox has an interest in the adjoining property (TMK: (3) 7-8-006:001, "LOT 10-A") which is the property most directly affected by the building and other encroachment issues.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant submitted a recent site plan map dated May 2, 2002 denoting the location and position of the building improvements and other site improvements, "AS BUILT". Portions of the dwelling and 2-water tanks were constructed into minimum 20 feet side yards and respective 14 feet side yard open space required by the Zoning Code. According to the applicant and DPW records, it appears that some of the building improvements were constructed without building permits. The applicant is asking for a variance to allow the dwelling and water tank positions and allow the "AS BUILT" building encroachments to remain within the minimum yards prior to applying for an "after-the-fact" building permits. According to the applicant the water tank encroaching into LOT 10-A will be demolished and removed.

According to the variance application and objection letters and telephone calls received from adjoining property owner(s), the applicant and current owner(s) were aware of the building encroachment issues prior to the submission of the variance application. Furthermore, it appears that the current owner(s) purchased the property knowing of the building and encroachment issues. It appears that the past owner(s) and builders ignored the Zoning and Building Codes. It appears that the non-permitted improvements and other access and related site improvements were constructed beyond the property's building line and into adjoining property by the previous owner(s). The adjoining property owners are against variance request and current owner's (applicant) desire to "fix the problem or encroachment issues" and seek "after-the-fact" permits to allow the "non-permitted" dwelling improvements and other building encroachments to remain. The Planning Director finds that the building encroachment issues and actions by the past property owner(s) to construct portions of the dwelling and water tank improvements without any building or construction permits had a negative impact on the adjoining property owners and created negative feelings among residents of the surrounding neighborhood. To grant the variance and allow the affected portions of the dwelling and tank encroachments to remain violate the intent and purpose and spirit of the General Plan and the Zoning and Subdivision Codes.

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Therefore, considering the variance background, past building history, and other information received, it is felt there are no special or unusual circumstances applying to the subject property which exist either to a degree which deprive the applicant or 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 property.

ALTERNATIVES

Alternatives available to the applicant and current owners to address and correct the existing building encroachments include the following actions:

1. Remove the building encroachments within the affected side yards.
2. Redesign and relocate the affected "dwelling" and "water tank" improvements to fit within the correct building envelope prescribed by the Zoning Code, and/or other similar design alternatives, etc.
3. Confer with adjoining property owners to consolidate the subject TMK property with the adjoining property TMK property and resubdivide the resultant consolidated lot to modify the property geometry and/or change the metes and bounds descriptions in accordance with the minimum yard requirements of the Zoning Code.

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. The dwelling encroachments and tank locations were constructed and completed by the past owners without a building permit and without regard to the common boundary lines and State and County building law.

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It appears that the "dwelling and tank building improvements" within the affected side yards and respective side yard open space requirements are physically and visually obtrusive from adjacent property(s) pursuant to objection letters received from the adjoining land owners, and, we concur with the adjoining property owner's statements and feelings expressed in their telephone calls and letters; that portions of the "dwelling" location and "water tank" locations, and other driveway and site improvements have had a negative affect on the character and spirit of the adjoining property owners and neighborhood; and, deviated from agricultural character and surrounding land patterns. It appears that the past owner(s) knowingly ignored, avoided or violated building laws. It appears that the dwelling additions and encroachment(s) within the affected side yard and open spaces **are not** a builder's mistake or misinterpretation of the minimum building yards or boundary lines by the past owner(s). The severe and cumulative encroachment issues, including the driveway locations, cannot be attributed to "human error" due to the severity of the encroachments. Further, it is felt that the existing encroachments issues within the affected side yard and side yard open space requirements and adjoining property(s) were constructed without any feeling or understanding the impact of these improvements would have on the adjoining property(s). The surrounding property owner(s) have strongly objected to the variance application via numerous telephone calls and letters. The adjoining owners object to applicant's request, on behalf of the current owners, to allow the dwelling encroachments and tank building positions to remain and any request for "after-the-fact" building permits to allow the dwelling and water tank encroachments. None of the surrounding or adjoining property owners support the variance request and have requested that all building encroachments, water tanks, walls, and driveway issues be addressed by the current owners and removed.

The applicant has adequate room within the subject 1.247 acre property or within the building line(s) of the subject TMK property established by the Zoning Code to locate or expand the "dwelling" together with other area to locate supplemental water tanks. It appears that the decision to expand the "dwelling" and locate both "water tanks" beyond the building line and encroach into the affected side yards **and** adjoining property was a deliberate decision by the past owner(s). To ignore common boundary lines or building limits established by the Zoning Code in 1967 and County building laws cannot be considered a hardship or special or unusual circumstance in favor of the variance request.

Based on the findings, recent inspection of the premises by the Planning Department, and past owner(s) or builder's decision to ignore common boundary lines and county building permit requirements, the approval of the variance request to allow the building encroachments to remain within the affected side yard and side yard open space requirements would not 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.

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PLANNING DIRECTOR'S DECISION AND OTHER REQUIREMENTS

This denial of your variance request requires you to immediately remove the non-permitted improvements and be aware of the following deadline and other requirements:

1. The non-permitted building improvements "Dwelling Over Garage Deck" shall be removed on or before **January 15, 2003**. Otherwise, these non-permitted improvements will be considered a violation of the Zoning Code and penalties will be assessed from the **date of this letter**.
2. The water tanks shall be relocated and comply with minimum yards of the Zoning Code pursuant to building permits or demolished on or before **January 15, 2003**. Otherwise these non-permitted improvements will be considered a violation of the Zoning Code and penalties will be assessed from the **date of this letter**.
3. The driveway encroachment within an adjoining access easement owned by "John D. Weeks II, Et al." shall be removed and the driveway encroachments and any wall encroachments within adjoining property(s) denoted on the variance site plan map shall be immediately removed and reconstructed or relocated within the subject property. The applicant or current owner(s) shall confer with the adjoining property owners to confirm and coordinate the required corrective actions.
5. The outstanding building permits and other construction permits issued to the subject TMK property and cited by recent DPW memorandums and records shall be addressed by the applicant or current owner(s). These permits shall be "finaled" or closed by the Department of Public Works (DPW) Building Division prior to any change in title or further sale of the subject TMK property.
6. Any 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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In accordance with a recent charter amendment and Ordinance No. 99-112, you may appeal the director's decision and request the following:

- (a) Any person aggrieved by the decision of the director in the administration or application of this chapter, may, within thirty days after the date of the director's written decision, appeal the decision to the board of appeals.
- (b) A person is aggrieved by a decision of the director if:
 - (1) The person has an interest in the subject matter of the decision that is so directly and immediately affected, that the person's interest is clearly distinguishable from that of the general public: and
 - (2) The person is or will be adversely affected by the decision.
- (c) An appeal shall be in writing, in the form prescribed by the board of appeals and shall specify the person's interest in the subject matter of the appeal and the grounds of the appeal. A filing fee of \$250 shall accompany any such appeal. The person appealing a decision of the director shall provide a copy of the appeal to the director and to the owners of the affected property and shall provide the board of appeals with the proof of service.
- (d) The appellant, the owners of the affected property, and the director shall be parties to an appeal. Other persons may be admitted as parties to an appeal. Other persons may be admitted as parties to an appeal, as permitted by the board of appeals.

The board of appeals may affirm the decision of the director, or it may reverse or modify the decision, or it may reverse or modify the decision or remand the decision with appropriate instructions if based upon the preponderance of evidence the board finds that:

- (1) The director erred in its decision; or
- (2) The decision violated this chapter or other applicable law; or
- (3) The decision was arbitrary or capricious or characterized by and abuse of discretion or clearly unwarranted exercise of discretion.

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In view of the above, we have enclosed GENERAL PETITION FOR APPEAL OF DECISIONS
BY PLANNING DIRECTOR.

Sincerely,



CHRISTOPHER J. YUEN
Planning Director

WRY/CJY:cps
P:\WP60\WRY\FORMLETT\VARAPPZCTMK78006015.BC

Enclosure

xc: Real Property Tax - Kona
Planning Dept. - Kona
John D. Weeks II
Herbert H. Okano
L. Kaiulani Weeks
Elizabeth Puaa
Robert P. Hickcox
Jeff Darrow-Zoning Inspector