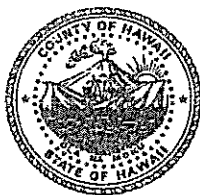


Harry Kim  
Mayor



Christopher J. Yuen  
Director

Roy R. Takemoto  
Deputy Director

## County of Hawaii

### PLANNING DEPARTMENT

101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720-3043  
(808) 961-8288 • Fax (808) 961-8742

August 18, 2004

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

Dear Mr. Conventz:

**VARIANCE PERMIT NO. 1468 WH (VAR 04-045)**

**Applicant: KLAUS D. CONVENTZ**  
**Owners: ROBERT O'ROURKE, ET AL.**  
**Request: Variance from Minimum Yards**  
**Pursuant to Chapter 25, Zoning**

**Tax Map Key: 7-3-029:009, Lot A**

After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No. 1468 allows portions of a dwelling to remain, "AS-BUILT", on the subject TMK property (Lot A), with a minimum 11.5 feet to 11.58 feet side yard and attendant minimum 8.19 feet to 8.33 feet side yard open space in lieu of the minimum 15.0 feet side yard and attendant minimum 10.0 feet side yard open yard space requirements, respectively, according to the variance application site plan map and other information submitted with the variance application. The variance request is from the subject TMK's minimum side yard requirements pursuant to the Hawaii County Code, Chapter 25, Zoning, 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 space requirements, (a).

### BACKGROUND AND FINDINGS

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1. **Location.** The subject property, Lot A consisting of 0.42 acre (20,104 square feet), is within Kona Palisades Subdivision, portion of Grant 2972, and situated at Kalaoa 5<sup>th</sup>, North Kona, Hawaii. The property's address is 73-1402 Ka'iminani Drive.

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

2. **Variance Application-Site Plan.** The applicant submitted the variance application, attachments, and filing fee on or about March 23, 2004. The applicant's variance application site plan map drawing is drawn to scale. This site plan map denotes the location of the 2-story dwelling and eave encroachments, "AS BUILT", within minimum 15 feet side yard and attendant side yard open space requirements pursuant to the map dated and signed on March 2, 2004 by Pattison Land Surveying, Inc.

The applicant's background states in part:

"However, the additions were built after the consolidation, increasing both, setback and attendant open space by 5.0 to 15.0 feet and 10.0 feet respectively. Thus, throwing the otherwise legal structure retroactively into violation. The key is that the enclosure of the lanai (conversion into living area) in 2002 caused the unintended violation because this was done after the reconsolidation."

**Note:** The dwelling's wastewater system is not located or identified on the site plan map. The variance request does not address the location of "Stucco Wall" or any other issues related to property use. Any existing perimeter walls and/or landscape materials straddling TMK boundary lines or other boundary encroachments must be addressed and resolved by applicant or between the affected parties or between legal property owner(s).

3. **Agency Comments and Requirements-WH (VAR 04-045):**

- a. The Department of Public Works (DPW) memorandum dated April 20, 2004, states in part:

"We reviewed the subject application and our comments are as follows:

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### BUILDING

1. Buildings shall conform to all requirements of code and statutes pertaining to building construction, (see attached memorandum from our Building Division)."

The attached DPW memorandum dated April 19, 2004 states in part:

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

All new building construction shall conform to current code requirements.

The minimum setbacks shall be maintained as follows:

Residential structures-3 ft. side, 3 ft. rear

Commercial structures-5 ft. side, 5 ft. rear

Others: The building permit No. 026515, the plumbing permit No. M026774, and the electrical permit No. E026774 and EK05631 were not finalized."

- b. The State Department of Health (DOH) memorandum dated April 30, 2004 states:

"The Health Department found no environmental health concerns with regulatory implications in the submittals."

4. **Notice to Surrounding Property Owners.** Proof of mailing a first and second notice was submitted to the Planning Department. For the record, it appears that first and second notices were mailed on March 22, 2004 and April 20, 2004 by the applicant.
5. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. No objections from surrounding property owners and/or public were received:

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### **SPECIAL AND UNUSUAL CIRCUMSTANCES**

According to the applicant, the building position issues were discovered after building renovations were completed of a dwelling originally constructed on Lot 9. The minimum yard requirements were increased after Lot 9 and Lot 10 of the Kona Palisades Subdivision after said lots were allowed to be consolidated into Lot A. The dwelling's position and encroachment issues were identified during the sale of the property. The applicant, on behalf of the current owners, is trying to resolve the building encroachment issues. The variance application's site plan denotes the location of the building improvements and other site improvements, "AS BUILT" on "LOT A". The site plan identifies the dwelling encroachments within the property's minimum 15 feet side yard and attendant 10 feet side yard open space requirements pursuant to the Hawaii County Zoning Code. It appears that most of the original dwelling improvements were constructed on Lot 9 under valid building permit(s) and construction permits issued by the County. It appears that the original dwelling improvements constructed on "Lot 9" met minimum yard requirements before the consolidation was approved. It appears that the building inspections of the premises, during building construction and throughout the life of the building permit(s) issued to previous TMK(s) and consolidated property-Lot A did not disclose building position issues or encroachment issues.

### **ALTERNATIVES**

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

1. Remove the building encroachments or redesigning or relocating the dwelling to fit within the correct building envelope prescribed by the Zoning Code.
2. Consolidation of the subject TMK property with adjoining property (Lot 8) and resubdivision to modify property lines and adjust minimum side yards.

### **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)/uses and boundary/property lines.

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It appears that the dwelling's encroachments into affected minimum 15 feet side yard and attendant side yard open space requirements on Lot A are not physically and visually obtrusive from the adjoining property (Lot 8) or right-of-way. It appears that the building encroachment issues were discovered after Lot 9 and Lot 10 were consolidated into Lot A, and, after a building permit or construction permits were issued to Lot A. As a consequence of the consolidation of both "non-conforming" sized lots and other provisions of the Zoning Code, the minimum front, rear, and side yard(s) for Lot A were increased. Portions of the original dwelling legally built on Lot 9 became "non-conforming" after the consolidation was approved. Recent building modifications or renovations to the original dwelling will not depreciate or detract from the character of the surrounding neighborhood and surrounding land and building patterns. Therefore, it is felt that the building encroachments on Lot A or within the affected 15 feet side yard and attendant 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 letter dated April 13, 2004 and additional time to consider agency comments and applicant's request was necessary. The applicant agreed to extend the date on which the Planning Director shall render a decision on the subject variance to no later than August 31, 2004.

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/owner, their successors or assigns, officers, employees, contractors, or agents under this variance or relating to or connected with the granting of this variance.

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3. Portions of the "Dwelling" or building improvements on "LOT A" will not meet Chapter 25, the Zoning Code's minimum 15 feet side yard requirements and attendant minimum 10 feet side yard open space requirements, "AS BUILT". The approval of this variance allows the building encroachments to remain, "AS BUILT", in accordance with the variance site plan map dated and signed on March 3, 2004.
4. The following building permits or construction permits: Building Permit No. 026515, Plumbing Permit No. M026774, and Electrical Permit No(s). E026774 and EK05631 issued to original TMK(s) or consolidated TMK property (LOT A) shall be "finalized" or closed prior to any change in title or sale of the subject TMK property.
5. No permit shall be granted to allow an ohana dwelling or building permit issued to allow construction of 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.
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

WRY:cd  
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cc: Real Property Tax Office-Kona  
Planning Dept.-Kona