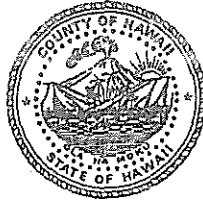


Harry Kim
Mayor



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

September 7, 2005

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

Dear Mr. Conventz:

VARIANCE PERMIT NO. (WH) VAR 04-102

Applicant: KLAUS D. CONVENTZ

Owners: JOSE PACHECO JR., ET AL.

**Request: Variance from Minimum Yards
Pursuant to Chapter 25, Zoning**

Tax Map Key: 7-3-033:089, Lot 89

After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request subject to conditions. Variance Permit No. 04-102 allows Portions of a dwelling to remain, "AS-BUILT", on the subject TMK property, Lot 89, with a minimum 8.2 feet side yard and dwelling eave with 2.5 feet side yard open space, in lieu of the minimum 10.0 feet side yard and attendant minimum 5.0 feet side yard open space requirements, respectively, according to the variance site plan map dated and signed on October 23, 2004. The variance request is from the subject TMK's minimum side yard and attendant side yard open space requirements pursuant to the Hawaii County Code, Chapter 25, Zoning, 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 space requirements, (a).

BACKGROUND AND FINDINGS

1. **Location.** The subject property, Lot 89 containing 12,427 square feet, is located within Kona Palisade Subdivision, Unit II, File Plan 1087, and situated at Kalaoa 5th, North Kona, Hawaii.

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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 November 5, 2004. The variance application site plan map drawing dated October 23, 2004 is drawn to scale and prepared by KKM SURVEYS. The site plan map denotes the location of the "Dwelling" encroachments, "AS-BUILT" into the minimum side yard and attendant side yard open space requirements.

The applicant's background states in part:

"The dwelling was built under Permit No. 08116, for the dwelling issued in 1987; Building Permit No. 926087, for an in-ground swimming pool, issued in 1992; Building Permit No. 975697 for lanai roof cover issued July 11, 1997 and Building Permit No. 896610 for an addition, issued in 1989.

Owners were unaware of any problem when a setback survey conducted October 23, 2004 by KKM-Surveys revealed the encroachments."

3. **Agency Comments and Requirements-(WH) VAR 04-102:**

- a. The Department of Public Works (DPW) memorandum dated January 4, 2005, states in part:

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

1. Buildings shall conform to all requirements of code and statutes pertaining to building construction, (see attached memorandum from our Building Division)."
2. The applicant shall remove any encroachments or obstructions within the County Right-of-Way."

The copy of the DPW memorandum dated December 29, 2004, states in part:

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“All new building construction shall be conditioned on the comments as noted below.

The minimum setbacks shall be maintained as follows:

Residential structures-3 ft. side, 3-ft. rear
Commercial structures-5 ft. side, 5 ft. rear”

The projections do not meet setback requirements and should be corrected. Others: The building permit No. 906512 (sic) and electrical permit no. EK 05687 (sic) are not finalized.”

- b. The State Department of Health (DOH) memorandum dated January 6, 2005 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 November 5, 2004 and December 20, 2004, respectively, by the applicant.
5. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. No written comments or objections from surrounding property owners or public were received.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant, on behalf of the current owners, is trying to resolve the building encroachment issues. The variance application's site plan map was prepared by a surveyor and denotes the location of the dwelling and other site improvements, "AS BUILT" on "LOT 89". The site plan identifies the dwelling's building position together with other building issues within the property's minimum yards and attendant open yard requirements pursuant to the Hawaii County Zoning Code. The applicant and/or current owners became aware of building encroachment issues after the survey map was completed. No evidence has been found to show indifference or premeditation by the owners or builders to deliberately create or intentionally allow the 8 to 18 year old building encroachments to be built. The original dwelling and subsequent building

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additions and site improvements were constructed under valid building permit(s) and other construction permits issued by the County; and initial inspections by the agencies did not disclose any building encroachment issues or building setback irregularities.

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 Lot 89 with adjoining Lot 47-B-2 (TMK: 7-3-010:037) and resubdivision to modify property lines or adjust minimum 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.

It appears that the dwelling encroachments into the minimum yards are not physically and visually obtrusive from adjacent property(s) or rights-of-way. It appears the 18-year old dwelling and 8 + year old lanai or roof eave/gutter encroachments do not depreciate or detract from the character of the surrounding neighborhood or surrounding building or land patterns. Therefore, it is felt that the existing dwelling and open lanai "eave" encroachments within the yards identified on the variance application site plan map will not detract from the character of the immediate neighborhood or the subdivision. According to the applicant, portions of the existing roof eave/gutter encroachments within the affected side yard or side yard open space will be "cut-back" or relocated to meet minimum DPW building setback requirements.

The subject variance application was acknowledged by letter dated December 13, 2004 and additional time to consider agency comments was necessary. The applicant agreed for an extension of time to complete the variance background report and 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

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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:

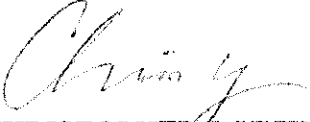
1. The applicant/owner, their assigns or successors shall be responsible for complying with all stated conditions of approval.
2. The applicant/owner(s), successors or assigns shall indemnify and hold the County of Hawaii harmless from and against any loss, liability, claim, or demand for the property damage, personal injury, or death arising out of any act or omission of the applicants/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 a dwelling and roof eave/gutter on the subject TMK property or Lot 89 will not meet Chapter 25, the Zoning Code's minimum yard and attendant minimum open yard requirements. The approval of this variance allows dwelling and lanai eave/gutter encroachments and/or building improvements meeting minimum DPW residential setbacks identified on the variance application's site plan map to remain, "AS BUILT", on the subject TMK property (Lot 89).
4. The applicant or designee shall remove portions of the "fascia" or roof eave/gutter to comply with DPW building code or residential side yard open space requirements required by the DPW. Any outstanding building or construction permits issued to subject TMK property by the DPW shall be addressed by the applicant and closed or "finaled" by the DPW-Building Division (Kona) prior to future sale of the property.
5. No permit to allow an ohana dwelling shall be granted on subject TMK property (Lot 89), subject to provisions of the Hawaii County 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

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