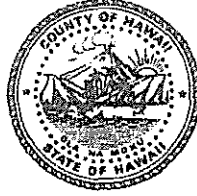


Harry Kim
Mayor



Christopher J. Yuen
Director

Brad Kurokawa, ASLA
LEED® AP
Deputy Director

County of Hawaii
PLANNING DEPARTMENT

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

May 9, 2006

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

Dear Mr. Conventz:

SUBJECT: VARIANCE PERMIT-VAR 05-042
Applicant: KLAUS D. CONVENTZ
Owners: ELBERTY. F. SUNN, ET AL.
Request: Variance from Minimum Yards
Pursuant to Chapter 25, Zoning
Tax Map Key: 7-7-020:069, Lot 23

After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request subject to variance conditions. Variance Permit-VAR 05-042 allow portions of a 2-story dwelling and associated dwelling improvements to remain on "LOT NO. 23", "AS-BUILT", with a minimum 10.96 feet to 12.60 feet front yard and attendant minimum 8.96 feet to 10.60 feet front yard open space; and, minimum 3.69 feet to minimum 3.93 feet side yard and attendant minimum 0.66 feet to 1.08 feet side yard open space, in lieu of the minimum 20.00 feet front yard and attendant 14.00 feet front yard open space requirements; and, minimum 10.00 side yard and attendant minimum 5.00 feet side yard open space requirements, respectively, according to the variance site plan map dated and signed on May 5, 2005. The variance is from the TMK property's minimum front and side yard(s) and attendant front yard open and side yard open space requirements, respectively, pursuant to the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 1, Section 25-5-7, Minimum yards, (a)(2)(A)(B), and Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open space requirements, (a).

MAY 10 2006

BACKGROUND AND FINDINGS

1. **Location.** The subject property, Lot 23 containing 10,450 square feet, is within "LEILANI SUNSET SUBDIVISION", being portions of Grant 1591 and Grant 988, and situated at Holualoa 3rd, North Kona, Hawaii. The property's street address is 77-350 Ailina Street.

The property is zoned Single Family Residential (RS-10) by the County and designated Urban or "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 May 9, 2005 to the Kona Planning Department. The variance application's site plan map is drawn to scale and prepared by Pattison Land Surveying, Inc. The variance site plan map, signed and dated May 5, 2005, denotes portions of the "TWO STORY RESIDENCE" and other associated dwelling improvements are within the property's front yard and side (east) yard of "LOT NO. 23" or subject TMK property.

The applicant's background states in part:

"Owners were unaware of any problems when a setback survey, conducted by Thomas Pattison revealed the encroachments, while the property is in escrow for conveyance. The survey was revised on May 5, 2005."

Note: The variance site plan map does not identify the location of the cesspool or Independent Wastewater System (IWS). The variance request does not address the location or position of CRM Wall(s), fencing, and landscaping, etc. along or straddling common boundary lines.

3. **County Building Records:**

County building records show Building Permits (K04197, K04899, K05558, K06646), Electrical Permits (EK03792, EK05003), and Mechanical (MK03367) or Plumbing Permit were issued to subject TMK property. It appears that the dwelling and associated building improvements on "LOT NO. 23" were built pursuant to these building and associated construction permits issued between 1980 and 1984.

Mr. Klaus D. Conventz
dba Baumeister Consulting
Page 3
May 9, 2006

4 **Agency Comments and Requirements-VAR 05-042:**

- a. The Department of Public Works (DPW) memorandum dated June 14, 2005 states in part:

"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 June 13, 2005 DPW memorandum states in part:

"We oppose the approval of the application for the reasons 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. K04899 and Electrical permit EK05003 were never finalized."

Note: Current building records indicate only the 1-electrical permit (EK05003 is still "open". Refer to Variance Conditions.

- b. The State Department of Health (DOH) memorandum dated June 16, 2005 states:

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

- 5 **Notice to Surrounding Property Owners.** Proof of mailing notices to surrounding property owners was submitted to the Planning Department. For the record, the first and second notices were mailed on May 9, 2005 and June 13, 2005, respectively, by the applicant. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on or about June 13, 2005.

Mr. Klaus D. Conventz
dba Baumeister Consulting
Page 4
May 9, 2006

6. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. The following comments from surrounding property owners or the general public were received:

- 6a. Letter dated May 20, 2005 and comments by Gordon Monroe received by the Kona Planning Department on or about May 23, 2005.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant, on behalf of the current owners, submitted the variance application to address or resolve the dwelling encroachments within the property's minimum 20-foot front yard along Ailina Street and minimum 10-foot side (east) yard and respective minimum 10-foot and 5-foot open yard space(s). The variance application's site plan map was prepared by a surveyor and denotes the location of the 2-story dwelling, pool, associated attached building improvements, and other site improvements on "LOT NO. 23", "AS BUILT". The current owners became aware of building encroachment issues during escrow. No evidence has been found to show indifference or premeditation by previous owners or builders to deliberately create or intentionally allow these building encroachments to be built within the affected minimum yards and minimum open yard space requirements required by the Zoning Code. The 4-building permits issued to the subject TMK property were closed or "finaled" by the DPW.

It appears that the 26 year old dwelling improvements and subsequent dwelling improvements were constructed according to 4-building permits and other associated construction permits issued to subject TMK property. It appears that during construction of the dwelling improvements between 1980 and 1984, the 24 to 26 year old dwelling and associated attached building improvements within the TMK property's front yard and side (east) yard went unnoticed.

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 No. 23 with affected Right-of-Way (Ailina Street) and adjoining "mauka" lot(s) (TMK: 7-7-020:73, Lot 2 and TMK: 7-7-020:072, Lot 1) and resubdivision to modify property lines or adjust minimum yards.

Mr. Klaus D. Conventz
dba Baumeister Consulting
Page 5
May 9, 2006

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 subject building encroachments constructed 24 to 26 years ago within the TMK property's minimum front yard and minimum side (east) yard and attendant minimum open yard space requirements are not physically and/or visually obtrusive from the adjacent property(s) or right-of-way (Ailina Street). It appears that these 24 + year old building encroachments do not depreciate or detract from the character of the surrounding neighborhood, public uses, and surrounding land patterns. Therefore, it is felt that these building encroachments into the property's minimum front and side yard and attendant side yard open space identified on the variance application's site plan map dated May 5, 2005 will not detract from the character of the immediate neighborhood or the subdivision.

The subject variance application was acknowledged by letter dated June 3, 2005 and additional time to complete the variance background report and 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 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 the dwelling located on "LOT NO. 23" will not meet the TMK property's minimum front and minimum side (east) yard and attendant minimum side yard open space requirements pursuant to Chapter 25, the Zoning Code, according to the variance application's site plan map signed and dated May 5, 2005. The approval of this variance permits the dwelling and associated dwelling improvements to remain on subject TMK property or "LOT NO. 23", "AS BUILT", according to the variance site plan map signed and dated May 5, 2005.
4. The applicant or current owners shall address the status of the "open" electrical permit (EK05003) issued to subject TMK property by the DPW-Building Division. This "open" electrical building permit shall be closed or "finaled" by the DPW-Building Division-Kona on or before June 30, 2006 or prior to sale of the property or transfer of title of the property to others.

Note: County building records indicate 4-Building Permits issued to subject TMK property between 1980 and 1984 were closed or "finaled" by the DPW. However, the status of "the projections" not meeting DPW-Building Division "setback requirements" cited in the DPW memorandum dated June 13, 2005 shall be addressed by the applicant or current owner prior to sale of the property or transfer of title of the property to others.

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 or new building improvements and permitted uses shall be subject to State law and County ordinances and regulations pertaining to building construction and building occupancy.

Mr. Klaus D. Conventz
dba Baumeister Consulting
Page 7
May 9, 2006

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:mad
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xc: Real Property Tax Office-Kona
Gordon Monroe