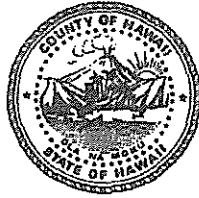


Harry Kim
Mayor



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 05-048
Applicant: KLAUS D. CONVENTZ
Owners: JAMES B. CLARKE, ET AL.
Request: Variance from Chapter 25, Zoning,
Minimum yards
Tax Map Key: 7-7-013:009, Lot 79

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 05-048 permits portions a 2-story dwelling/carport ("Lanai") remain on Lot 79, "AS-BUILT", with a minimum 12.4 feet rear yard and attendant minimum 9.8 feet rear yard open space and minimum 9.5 feet side yard in lieu of minimum 20.00 feet rear yard and attendant minimum 14.00 rear yard open space and minimum 10.00 feet side yard requirements, respectively, according to the variance site plan map dated and signed on May 9, 2005. The variance is from the TMK property's minimum rear and minimum side yard(s) and attendant rear yard open yard space requirements pursuant to the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 1, Section 25-5-7, Minimum yards, (a)(2)(B), 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 79 containing 10,000 square feet, is within Sunset View Terrace, Unit 2, File Plan 684, and situated at Holualoa 4th, North Kona, Hawaii. The property's street address is 77-6473 Kilohana Street.

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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 25, 2005 to the Kona Planning Department. The variance application's site plan map is drawn to scale and prepared by KKM SURVEYS. The variance site plan map, signed and dated May 9, 2005, denotes portions of the "Dwelling/Lanai" (Carport) are within the minimum 20 feet rear yard and minimum 10 feet side (north) yard of the subject TMK property or "LOT 79".

The applicant's background states in part:

"The dwelling was built in 1976 under Building Permit No. 1945 issued June 30, 1976, with the swimming pool addition under Building Permit No. 955173, issued February 28, 1995.

Owners were unaware of any problems when a setback survey, conducted by KKM-Surveys on May 9, 2005, revealed the encroachments."

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), wire fence, patio improvements, and landscaping, etc. along or straddling common boundary lines.

3. **County Building Records:**

County building records (circa 1980 to present) show 1-Building Permit (955173) and 2-Electrical Permits (E955582 and E955652 were issued to subject TMK property. It appears that the "Dwelling" on "LOT 79" was built circa 1976 and the "Pool" in 1995.

4. **Agency Comments and Requirements-VAR 05-048:**

- a. The Department of Public Works (DPW) memorandum dated September 2, 2005 states in part:

"The applicant shall remove any encroachments or obstructions within the

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County right-of-way.” (Refer to Variance Conditions).

- b. The State Department of Health (DOH) memorandum dated September 13, 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 25, 2005 and August 16, 2005, respectively, by the applicant. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on or about August 18, 2005.
6. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. No written comments or objections from surrounding property owners or the general public were received.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant, on behalf of the current owners, submitted the variance application to address or resolve the dwelling/lanai encroachments within a minimum rear and minimum side yard(s). The variance application’s site plan map was prepared by a surveyor and denotes the location of the dwelling/lanai (according to the applicant, the lanai is a carport) and other site improvements, “AS BUILT”, on “LOT 79”. The current owners became aware of building encroachment issues during escrow. No evidence has been found to show indifference or premeditation by the owner(s) or builders to deliberately create or intentionally allow these building encroachments to be built within the property’s minimum yards and minimum open yard space required by the Zoning Code.

It appears that the existing dwelling improvements and subsequent dwelling improvements were constructed according to building permits and other associated construction permits issued to subject TMK property. It appears that during construction of the dwelling in 1976, the dwelling/lanai encroachment within the property’s minimum 20 feet rear yard and 10 feet side (north) yard went unnoticed.

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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 79 with adjoining lot (TMK: 7-7-013:026, Lot 86 and TMK: 7-7-013:010, Lot 78) 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 30 year old dwelling/lanai encroachments within the minimum yards and attendant open yard space are not physically and/or visually obtrusive from the adjacent property (Lot(s) 78 and 80) or right-of-way (Kilohana Street). It appears that these dwelling/lanai encroachments within the property's minimum rear and side yard(s) 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 side yard and minimum rear yard and attendant minimum rear yard open space identified on the variance application's site plan map will not detract from the character of the immediate neighborhood or the subdivision.

The subject variance application was acknowledged by letter dated August 11, 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 79" will not meet the minimum side yard and minimum rear yard and attendant rear yard open yard space pursuant to Chapter 25, the Zoning Code, according to the variance application's site plan map May 9, 2005. The approval of this variance permits the Dwelling/Lanai-Carport improvements to remain, "AS BUILT", on the subject TMK property or "LOT 79" according to the variance site plan map dated May 9, 2005.

The applicant or current owners shall remove 3.4 feet of a CRM wall constructed along the northerly side lot line within the Kilohana Street (Right-of-Way) prior to sale of the property or transfer of title of the property by the current owner(s) to others.

4. 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.
5. 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.

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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

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xc: Real Property Tax Office-Kona