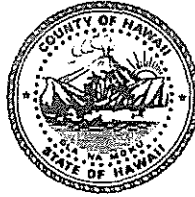


Harry Kim
Mayor



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

September 18, 2006

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

Dear Mr. Conventz:

VARIANCE-VAR 06-053

Applicant: KLAUS D. CONVENTZ

Owner: MERRILL KITTINGER

Request: Variance from Chapter 25, Zoning

Tax Map Key: 7-5-034:050, Lot 79

After reviewing subject variance application, the Planning Director certifies the approval of Variance-VAR 06-053 to allow portion of the dwelling with a minimum 19.7 feet front yard, and specific portions or segments existing CRM walls-wooden privacy "hardiplank" fence(s) exceeding 6 feet to 8.67 feet height within the front and rear yards, and a spa or "hot tub" with a minimum 1.8 feet rear yard to remain on Lot 79, "AS-BUILT", according to the variance site plan map signed and dated July 1, 2006. The variance is from the property's minimum 20 feet front yard, minimum 20 feet rear yard, the attendant minimum 14.00 feet front yard open and minimum 14.00 feet rear yard open space requirements, and 6.0 feet maximum wall-fence height provisions pursuant to the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 1, Section 25-5-7, Minimum yards, (a)(2)(A), Article 4, Division 4, Section 25-4-43, Fences and accessory structures, 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 containing 15,002 square feet is Lot 79 of Hualalai Colony Subdivision, Land Court Application 1666, Map 11, and situated at Puaa 3rd, North Kona, Hawaii. The TMK property's street address is 75-5610-J Hienaloli Road.

SEP 19 2006

The property is zoned Single-Family Residential (RS-15) 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 July 10, 2006 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 July 1, 2006, denotes portions of the "Dwelling", "Hot Tub", and "Wood Fence", and other site improvements were built within the minimum front and minimum rear yards of "LOT 79" or subject TMK property. A section of the perimeter CRM/fence exceeds the maximum 6 feet height limit allowed by the Zoning Code.

The applicant's background report dated July 9, 2006 states in part:

Page 1. "Subject residence with related retaining walls was built in 2002 under Building Permit No. 016566.

Subsequently owner applied in March 2005 for building permit including at-ground swimming pool, cabana, pool deck with additional retaining and privacy walls and fences.

Owner had prepared the required excavation to accommodate those additional improvements, and had in expectation of the permit approval, ordered the precutting of the deck, cabana and took delivery of the pre-manufactured metal-liner pool and spa."

Page 2. Upon lengthy discussion of subject and relevant regulations contained in the Zoning Code, there was general consent, and staff determined that the pool and deck, detached and separated from the dwelling by 5.0 ft. wide concreted sidewalk, should indeed be treated as an at-grade pool and deck, while privacy fence, CRM walls and spa should be subjected to this variance application procedure."

Page 3. "Items subject to variance application:

- a) The CRM wall and small in-ground concrete water feature retain the sloping grade of the private road; the slope being the reason why the CRM wall at the fence connection (West) is 7 ft. 4 in. (7.33 ft.) high, although limited to this point only, however, a height violation of 1.33 ft. (or 16 in.) with a 5.4 ft. clear space.

- b) The CRM wall relative to the northerly (rear) boundary exceeds the permissible height at its intersection with the hardiplank fence by 2.33 ft. (or 28 in.) with 1.8 ft. clear space, and the fence with 7.0 ft. exceeds the permissible height by 1.0 ft. (or 12 in.).
- c) The hot tub, although being top to grade less than 5.0 ft., is portable, and has a clear space (setback) to the rear boundary of 3.3 ft.

Undersigned submits that the encroachments are not perceptable from neighbor lots or public view, and provide privacy to both, owner and adjoining neighbor.”

Note: In addition to “a)”, “b)”, and “c)” above, the variance permits portions of the dwelling within the property’s minimum 20 feet front yard to remain, “AS-BUILT”, e.g. “19.7’ to Dwelling”. The variance plan map does not denote or address the location of any cesspool or Independent Wastewater System (IWS). The variance request does not address the location or position of any landscaping, etc. along or straddling common boundary lines.

Site Inspection. Planning Department staff viewed the completed building and site improvements on subject TMK property together with the applicant/owner on September 14, 2006

3. **County Building Records:**

County building records show 2-Building Permits (016566, 036030), 2-Electrical Permits (E016677, E035130), and 1-Mechanical (M016250) or Plumbing Permit were issued to subject TMK property. It appears that the dwelling and other site improvements on “LOT 79” were constructed pursuant to these building and associated construction permits issued between 2001 and 2003.

4 **Agency Comments and Requirements-VAR 06-053:**

- a. The Department of Public Works (DPW) memorandum dated August 3, 2006 states in part:

“We reviewed the subject application and have no comments.”

- b. The State Department of Health (DOH) memorandum dated August 4, 2006 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 July 10, 2006 and July 21, 2006, respectively, by the applicant. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on July 25, 2006.
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 owner, submitted the variance application to address or resolve the dwelling, hot tub, and fence encroachments and fence height within the affected minimum front and minimum rear yards. 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 79". The current owner became aware of building encroachment issues within the property's minimum yards and fence height issue after the improvements were completed. No evidence has been found to show indifference or premeditation by the builders to intentionally construct the dwelling and related site improvements within the affected yards or exceed the maximum height for perimeter fences.

It appears that the existing dwelling, pool, and other site improvements were constructed according to building permits and other associated construction permits issued to subject TMK property. The location or position of the completed building improvement and encroachments into the affected yards and fence height issue were discovered after the dwelling, pool, and other site improvements were completed by the builders. It appears that the position of the building improvements within the property's minimum yards and fence height went unnoticed by the agencies during construction.

ALTERNATIVES

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

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1. Remove the building encroachments or redesigning or relocating the water feature, hot tub, and relocate and/or modify the CRM wall/fence to fit within the correct building envelope prescribed by the Zoning Code or fence height prescribed by the Zoning Code.
2. Consolidation of the property with adjoining property and resubdivision to modify property lines or adjust minimum yards, etc.

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 and fence improvements constructed approximately 3 years ago within the minimum yards are not physically and/or visually obtrusive from the adjacent or nearby properties (Lots 77/78 and Lots 80/81) or privately owned right-of-way fronting the subject TMK property identified on the variance site plan map. The recent site inspection reveals that subject TMK property's "lay of the land" and other abutting building sites exhibit unusual slope and require extensive grading or excavation to carefully position building improvements to maintain viewplanes and privacy between living spaces. It appears that these 3 year old building improvements and perimeter retaining wall(s) and fencing improvements do not depreciate or detract from the character of the surrounding neighborhood and surrounding land patterns. Therefore, it is felt that the dwelling or other building encroachments into the property's affected yards and fence location and overall finished fence height denoted on the variance application's site plan map or discussed in the applicant's application will not detract from the character of the immediate neighborhood or the subdivision.

The subject variance application was acknowledged by letter dated July 12, 2006 and additional time to schedule a staff inspection of the subject property and adjoining property(s) was necessary. The applicant, on behalf of the owner, agreed to an extension of time to September 22, 2006 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

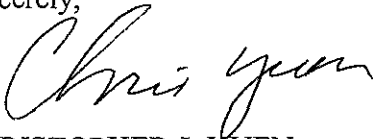
This variance request is approved subject to the following conditions:

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, pool or hot tub, portions of the CRM/fencing (including fence height) improvements on "LOT 79" will not meet the minimum front and minimum rear yard, attendant minimum open yard requirements, and fence height pursuant to Chapter 25, the Zoning Code, according to the variance application's site plan map. The approval of this variance permits the dwelling and related site improvements including fencing to remain on "LOT 79", "AS BUILT", according to the variance site plan map signed and dated "7/1/2006" in subject variance file.
- The applicant or current owners shall address the "open" status of Building Permits-BP No. 016566 and BP No. 036030), issued to subject TMK property by the DWS. The "open" building permits issued to subject TMK property shall be closed or "finaled" by the DPW-Building Division on or before December 31, 2006 or prior to sale of the property or transfer of title of the property by the current owner 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

WRY:cd
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xc: Real Property Tax Office-Kona