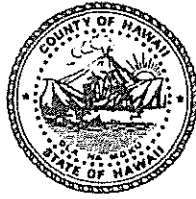


Harry Kim
Mayor



Christopher J. Yuen
Director

Brad Kurokawa, ASLA
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County of Hawaii
PLANNING DEPARTMENT

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October 20, 2006

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

Dear Mr. Conventz:

VARIANCE-VAR 06-069

Applicant: KLAUS D. CONVENTZ
Owners: RICHARD D. ROSE, ET AL.
Request: Variance from Chapter 25, Zoning,
Minimum yards

Tax Map Key: 7-7-015:002, Lot 12

After reviewing your variance application, the Planning Director certifies the approval of Variance-VAR 06-069 subject to variance conditions. The variance allows portions of a "TWO STORY RESIDENCE" or "2-story single family dwelling with screened in lanai" to remain on Lot 12, "AS-BUILT", with minimum 3.0 feet side yard and attendant minimum 2.00 feet side yard open space in lieu of minimum 8.00 feet side yard and attendant minimum 4.00 feet side yard open space according to the variance application's site plan map signed and dated August 23, 2006. The variance is from the TMK property's minimum side yard and attendant minimum side yard open space required by the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 1, Section 25-5-7, Minimum yards, (a)(1)(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 TMK property, Lot No. 12 containing 9241 square feet of "KONA SEA VIEW LOTS", File Plan No. 970, being a portion of Royal Patent No. 1289, Land Commission Award No. 7228 to Loe, is situated at Holualoa 4th, North Kona, Hawaii. The subject property's street address is 77-6465 Sea View Circle.

The property is zoned Single-Family Residential (RS-7.5) by the County and designated Urban or "U" by the Land Use Commission (LUC). The property is within the Special Management Area (SMA). However, the property does not abut the shoreline.

2. **Variance Application-Site Plan.** The applicant submitted the variance application, attachments, and filing fee on or about August 23, 2006 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 August 23, 2006, denotes portions of the "TWO STORY RESIDENCE-SCREEN PORCH" was built within a minimum 8 feet side yard of "LOT NO. 12" or subject TMK property.

The applicant's background report dated August 20, 2006 states in part:

"The dwelling was built by predecessor under Building Permit No. 38186, issued March 13, 1968 with addition, Permit No. 43528 issued January 8, 1970.

The owners were unaware of any problem until a survey, conducted by Pattison Land Surveying, INC. (sic) August 10, 2006, revealed the encroachments.

After nearly 4 decades it is difficult to determine the cause of the encroachment.

However no malice and intent could be substantiated during the undersigned's site inspection, nor would predecessor owner or his/her contractor have benefited from such violation in any way.

It appears that the unknown contractor committed an honest staking error. Needless to say, the vast majority of designers and contractors, shortly after the Zoning Ordinance took effect in 1967, were unaware and uninformed about the relevance of setback regulations, in particular about the specifics and crucial differences between setbacks and projections. Indeed, the vast majority of professionals have still today considerable problems separating both issues properly.

In this case, the initial open deck/lanai, although slightly violating the projection rule, was subsequently screened in. Thusly the initial encroachment of the projection changed mostly into a general violation of setback rules.

The current owner will have to address an additional permit issue with the Department of Public Works, since a structural correction is required."

In addition to the above, the applicant further goes on to discuss roof eave "projections" above the "SCREEN PORCH":

"In this case undersigned advised owners to cut back the wall-line and deck-line to a minimum of 3.0 ft. distance from the boundary, as well as cutting back the eaves to at least 2.0 ft. from the boundary, while at the same time providing the fire-rating under Section 504 and 1711 for the remaining 12 inches of the eaves."

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 rock walls, fencing, and landscaping, etc. along or straddling common boundary lines.

3. **County Building Records:**

Real Property permit records show 2-Building Permits (38186, 43528) were issued to subject TMK property. It appears that the 2-story dwelling on "LOT 12" was built pursuant to these building permits issued in 1968 and 1970, respectfully.

4 **Agency Comments and Requirements-VAR 06-069:**

- a. The Department of Public Works (DPW) memorandum dated September 15, 2006 states in part:

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

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 September 14, 2006 states in part:

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

The minimum setbacks shall be maintained as follows:

3 ft. side, 3ft. rear

The projections do not meet setback requirements and should be corrected.

The exterior wall or projections shall be constructed to provide one-hour fire resistive occupancy separation.”

- b. The State Department of Health (DOH) memorandum is dated September 26, 2006. (Refer to memorandum in variance file).
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 August 22, 2006 and September 18, 2006, respectively, by the applicant. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on September 17, 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 owners, submitted the variance application to address or resolve the dwelling encroachments within the property's minimum 8 feet side yard and attendant minimum 4 feet open side yard space. The variance application's site plan map was prepared by a surveyor and denotes the location of the 2-story dwelling-screen porch and other site improvements, "AS BUILT", on "LOT 12". The current owners became aware of building's position and other encroachment issues after they purchased the property. No evidence has been found to show indifference or premeditation by previous owners or builders in 1968 or 1970 to deliberately create or intentionally allow these building encroachments to be built within the affected minimum side yard and attendant minimum side yard open space.

It appears that the existing dwelling improvements and subsequent dwelling improvements were constructed according to 2-building permits issued to subject TMK property nearly 28 years ago. It appears that during construction of the 2-story dwelling improvements during 1968 and 1970, the dwelling encroachment including the screen porch within the property's side yard went unnoticed. (Refer to variance conditions).

ALTERNATIVES

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

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dba Baumeister Consulting

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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. 12 with adjoining lot (TMK: 7-7-015:001, Lot No. 13) 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 subject building encroachments constructed approximately 28 years ago within the minimum side yard are not physically and/or visually obtrusive from the adjacent property (Lot No. 13) or right-of-way (Sea View Circle). It appears that these 28 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 affected side yard and attendant side 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.

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.

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3. Portions of the 2-story dwelling-screen porch located on "LOT NO. 12" will not meet the property's minimum side 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 August 23, 2006. The approval of this variance permits the "TWO STORY RESIDENCE-SCREEN PORCH" improvements to remain, "AS BUILT", on the subject TMK property or "LOT NO. 12" according to the variance site plan map.

The applicant or current owners shall confer with the DPW and address and secure any building permit(s) required for any improvements or additions to the "SCREEN PORCH", i.e. roof eaves, framing supports, etc. the building and screen porch improvements shall comply with County and UBC requirements.

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 to the existing building shall be subject to State law and County ordinances and regulations including UBC requirements 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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xc: Real Property Tax Office-Kona