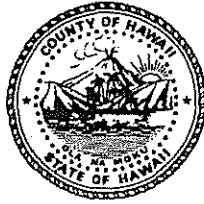


William P. Kenoi
Mayor



BJ Leithead Todd
Director

Margaret K. Masunaga
Deputy

County of Hawai'i

PLANNING DEPARTMENT

Aupuni Center • 101 Pauahi Street, Suite 3 • Hilo, Hawai'i 96720
Phone (808) 961-8288 • Fax (808) 961-8742

September 30, 2009

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

Dear Mr. Conventz:

SUBJECT: VARIANCE-VAR 07-067
Applicant: KLAUS D. CONVENTZ
Owners: MATTSON C. DAVIS, ET AL.
Request: Variance from Chapter 25, Zoning,
Minimum Yards
Tax Map Key: 7-8-019:025

After reviewing your application and the information submitted, the Planning Director certifies the approval of Variance-VAR 07-067 subject to variance conditions. The variance permits portions of 1-Story Guest House and attendant roof eaves to remain on Lot 28, "AS-BUILT", with minimum 9.9 feet side yard, minimum 7.6 feet to minimum 9.7 feet rear yard and attendant minimum 6.5 feet to minimum 4.0 feet rear yard open space in lieu minimum 10.0 feet minimum side yard, minimum 20.0 feet minimum rear yard, and minimum 14.0 feet rear yard open yard space according to the variance application's survey map signed and dated October 8, 2007. The variance is from the TMK property's minimum side yard, minimum rear yard, and attendant minimum rear yard open space requirements 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). (Notice of this variance application including original "PURPOSE" was previously published on October 30, 2007).

In addition to the above, VAR 07-067 permits enclosure of guest house "DECK" denoted on variance application's site plan map signed and dated October 8, 2007 to be enclosed or modified for privacy reasons increasing the current floor area to approximately 810 square feet +/- gross floor area under the guest house roof. The variance is from Chapter 25, Zoning, Article 4, Division 1, Use regulations, Section 25-4-9, Guest houses.

OCT 02 2009

BACKGROUND AND FINDINGS

1. **Location.** The referenced TMK property, Lot 28 containing 23,727 square feet, of Puuloa 1 Subdivision, is situated at Keauhou, North Kona, Hawaii. The referenced TMK property's street address is 78-7234 Puuloa Road.

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 original variance request and variance application, attachments, and filing fee on October 10, 2007 and amended variance request and other submittals on or about March 4, 2008. The variance application's site plan map is drawn to scale and prepared by KKM Surveys. The applicant's floor plan of the permitted accessory building including open lanai is drawn to scale. The variance site plan map, signed and dated October 8, 2007, denotes portions of "1-Story Guest House" is built into the property minimum 10 feet side yard and minimum 20 feet rear yard of "LOT 28" or subject TMK property.

The applicant's background information dated October 10, 2007, page 1, states in part:

"The residence was built under Building Permit No. 488, issued July 29, 1973, the detached garage under Building Permit No. 490, issued August 01, 1973. The subject guest house was built under Building Permit No. 935846, issued September 01, 1993, and received final inspection on March 03, 1994.

Owners were unaware of any violation until survey conducted by KKM Surveys, revealed on October 08, 2007 the encroachments.

Owner contemplates currently a consolidation/re-subdivision of subject lot with adjoining Tax Map Key 7-8-19:33, and surveyor made owner aware that they need first a variance from the Zoning Ordinance's setback regulations before proceeding."

Background information dated October 10, 2007, Page 2, states in part:

"There is only one explanation for the encroachment, the zero setback regulation for accessory structures at the time the structure was built. Although the guest

quarters are accessory to the main dwelling, accessory living structures were not meant to be build (sic) with no required setback.

Undersigned has found it on a regular base (sic) that the county and professionals in the construction trade confused clearly accessory living and regular accessory structures under Chapter 25.

No evidence of malice and intent could be found during undersigned's site inspection, nor would predecessor owner or his contractor have benefited from such violation in any way.

The violation is visually only perceptible to a professional thoroughly conversant with the intricacies of the pre-1996 regulations for accessory structures."

Note: The variance site plan map does not address the location or position of "Dry Stack Rock Walls", "Chain Link Fence", and any landscaping, etc. along or straddling common boundary lines shared with abutting properties.

3. **County Building Records:**

The Hawaii County Real Property Tax Office records show 4-Building Permits (488, 490, 935846, B2008-0096K), 2-Electrical Permits (E935846, B2008-0096K) and 2-Mechanical (M935727, M2008-0075K) or Plumbing Permit were issued to subject TMK property by the County of Hawaii-Department of Public Works (DPW). The guest house was issued a building permit (93846) in 1993; and, completed in 1994.

4. **Agency Comments and Requirements-Variance Application-VAR 07-067:**

a. The State of Hawaii-Department of Health (DOH) memorandum is dated November 26, 2007. Refer to the DOH memorandum in variance file.

5. **Notice to Surrounding Property Owners.** The applicant submitted copy of notices sent to a list surrounding property owners and proof of mailing notices to the Planning Department. According to the applicant's affidavits, notices were sent or mailed by US Mail to surrounding property owners on October 10, 2007, October 29, 2007, and March 11, 2008, respectively, by the applicant. Notice of the original and revised variance application or Variance Application-VAR 07-

067 application was published in the Hawaii Tribune Herald and West Hawaii Today on October 30, 2007 and March 13, 2008.

6. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. The following written objection letters, support letter, and comments were received:
 - 6a. Letter from Ronald S. McMahan dated November 7, 2008 supporting the variance request and application.
 - 6b. Objection letter dated November 14, 2007 from Scott B. Herman and Marla A. Herman.
 - 6c. Letter and comments dated November 14, 2007 from Jeanette Wessel.
 - 6d. Letter from current owner-Mattson Davis dated February 19, 2008 and comments regarding concerns cited by Scott and Marla Herman's letter dated November 14, 2007; and, owner's statements to address and/or make or construct additional improvements to guest house, etc.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant, on behalf of current owners, submitted the variance application to address or resolve the accessory building or guest house position upon the subject TMK property including privacy issues. The variance application's site plan map was prepared by a surveyor denoting the position of the dwelling, "1-story guest house", and other improvements, "AS BUILT", upon Lot 28. According to the applicant, the current owners became aware of issues regarding the guest house after a survey of the property was completed. No evidence has been found to show indifference or premeditation by previous owners/builder or current owners to deliberately allow portions of the permitted guest house completed nearly 15 years ago to be constructed into the property's minimum side yard. Portions of the original guest house including the open deck and roof line are non-conforming

According to Hawaii County Building records and background information, the detached guest house was issued a building permit (935846) to construct a 500 square foot guest house in 1993; and, the permitted guest house was completed in 1994 according to permit records. The 1-story guest house was permitted and completed prior to 1996 revisions to the County Zoning Code (Chapter 25). As such, the portions of the "1-story detached guest house" completed in 1994 including attached open deck or "open lanai" identified within the property's minimum 20 feet rear yard are non-conforming. Portions of the "1-story detached guest house" completed in 1994

Mr. Klaus D. Conventz
dba Baumeister Consulting
Page 5
September 30, 2009

do not meet the minimum 10 feet side yard, required by pre 1996 and current Zoning Code. It appears that during construction of the "1-story detached guest house" between 1993 and 1994, portions of the 1-story guest house constructed within the property's minimum or required minimum 10 feet side yard went unnoticed by the previous owner, builders, and agencies.

Further, according to the applicant's background information, the guest house position upon Lot 28 was revealed by a 2007 survey of the subject TMK (Lot 28) and abutting property owned by the current owners for a future consolidation and subdivision application.

The request by the applicant to enclose "open lanai" or attached the guest house's attached open deck enlarging or increasing the guest house floor area within the property's minimum rear yard to address privacy issues, etc. are permitted by this variance from Chapter 25, the Zoning Code and subject to variance conditions.

ALTERNATIVES

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

1. Remove portions of the detached 1-story guest house constructed within the property's minimum side yard or relocating the guest house to fit within a building envelope denoted on the 2007 survey map.
2. Consolidation of the subject TMK property or Lot 28 with abutting TMK properties (TMK: 7-8-019:024, Lot 27 and/or TMK: 7-8-019:017, Kit 20) to modify common boundary lines and /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 portions of the original 1-story guest house improvements constructed approximately 15 years ago upon the subject TMK property and portions of the guest house within the minimum side yard of Lot 28 are not physically and/or visually obtrusive from the adjacent properties or visible from the rights-of-way. The proposed modification to enclose and enlarge the guest house is being proposed by the applicant or current owners to address privacy issues after the permitted guest house was completed in 1994. During construction of the guest house circa 1993 or 1994, it appears that the position 1-story guest house upon the subject TMK property was not a distraction to the neighborhood and/or surrounding building and land patterns

circa 1994. Therefore, it is felt that the position of the guest house within the affected side yard and applicant or owner's request to modify or enclose the open lanai or attached deck identified on the variance application's site plan map or other plan submittals will not detract from the character of the immediate neighborhood or the subdivision and may be allowed by variance subject to variance conditions.

The applicant's original variance application and amended request for variance was acknowledged by letters dated October 22, 2007 and March 4, 2008, respectively. Additional time to complete the variance background report and consider neighbor's concerns and objection letters or other comments from surrounding property owners was necessary. The applicant agreed for an extension of time to complete the variance background report and render a decision on the subject variance to before or by October 15, 2009.

Based on the foregoing findings, the applicant's request for 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 original 1-story guest house constructed circa 1993-1994 upon the subject TMK property or Lot 28 does not meet the property's minimum side yard pursuant to Chapter 25, the Zoning Code, according to the variance application's site plan map. The proposed renovations to the original 1-story guest house or proposed modifications to enclose the "open lanai" within the property's minimum rear yard for privacy reasons is permitted by variance. The approval of

Mr. Klaus D. Conventz
dba Baumeister Consulting
Page 7
September 30, 2009

this variance permits the "1-story guest house" improvements to remain, "AS BUILT"; and, allows the applicant or current owners to enclose the "open lanai" or renovations according to the variance site plan map proposed floor plan.

The applicant or current owners shall secure a Building Permit from the County DPW to enclose the "open lanai" or "Deck" attached to "1-story guest house" on or before December 31, 2009. Any building permits or other construction permits issued to subject TMK property shall be completed or "finaled" by the DPW- Building Division 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.

Should any of the foregoing conditions not be complied with, the Planning Director may proceed to declare Variance-VAR 07-067 null and void.

Sincerely,



BJ LEITHEAD TODD
Planning Director

WRY:mad
P:\WP60\WRY\FORMLETT\VAR07-067\APPSETBAC-ACCESSORYBLDG.BC-MATTSON

xc: Real Property Tax Office-Kona
Mr. and Mrs. Scott B. Herman
Jeanette Wessel