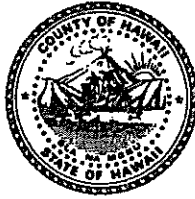


Harry Kim
Mayor



Christopher J. Yuen
Director

Brad Kurokawa, ASLA
LEED® AP
Deputy Director

County of Hawaii
PLANNING DEPARTMENT

101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720-4224
(808) 961-8288 • FAX (808) 961-8742

September 10, 2008

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

Dear Mr. Conventz:

VARIANCE-VAR 08-024

Applicant: KLAUS D. CONVENTZ
Owners: JAMES S. PHILLIPS LIVING TRUST
Request: Variance from Chapter 25, Zoning,
Minimum Yards

Tax Map Key: 6-6-004:090

After reviewing your variance application, the Planning Director certifies the approval of Variance-VAR 08-024 subject to variance conditions. The variance allows portions of a "2-STORY RESIDENCE" to remain, "AS-BUILT", upon Lot A-2b, with minimum 9.79 feet side yard and minimum 2.70 feet to minimum 15.35 rear yard in lieu of the property's minimum 10.00 feet side yard and minimum 20.00 feet rear yard, respectively, according to variance application's site plan map or survey map signed and dated March 14, 2008. The variance is from the property's (Lot A-2b) minimum side yard and minimum rear yard pursuant to 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).

BACKGROUND AND FINDINGS

1. **Location.** The referenced TMK property, Lot A-2b containing 14,500 square feet of "Lalamilo House Lots 2nd. Series", being portions of Grant 13706, is situated at Lalamilo, Waimea, Hawaii. The referenced TMK property's address is 66-1694 Lanikipu Place.

SEP 11 2008

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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 April 8, 2008. 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 March 14, 2008, denotes portions of a "2-STORY RESIDENCE" were built into and upon the subject property's minimum 10 feet side yard and minimum 20 feet rear yard of "LOT A-2b" or subject TMK property.

The applicant's background information dated April 6, 2008 states in part:

"The dwelling was built under Building Permit No. 64073, issued November 14, 1975 and received all inspections as the enclosed approved building permit application copy shows.

Actually, the permit includes a total of 2,744 square feet plus 270 square feet for the patio, while the tax assessor's handbook reflects 2,797 square feet as of October 18, 1976, 4-pages tax records are included for your review. Please note that the copy received (sic) from DPW-Building Division was so poor, that the undersigned' in the presence of the clerk wrote in red the contents needed.

Currently repair permit (after earthquake) B2007-1530k is pending and in the process of requesting final inspection for this part.

In any case, the owners were unaware of any violation until survey conducted by Pattison Land Surveying, Inc. revealed on March 14, 2008 the encroachments, while the property is being prepared under seller's due diligence for contemplated listing and sale.

No evidence of malice and intent could be substantiated during undersigned's site inspection; nor would owners or their contractor have benefited from such violation in any way.

The only reasonable explanation is, that inadvertently the southwesterly boundary of the neighbor lot to the Northwest, Tax Map Key (3) 6-6-4:58, which is also owner's property, could have been confused with subject's northwesterly boundary.

There is no doubt that the designer/architect, owner/applicant and various county agencies overlooked the violation.”

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 the concrete driveway, wire fencing, and landscaping, etc. along or straddling common boundary lines.

3. **County Building Records:**

The applicant’s variance application includes information from the County of Hawaii Real Property Tax Office and copy of the building permit (B No. 64073) issued circa November 11, 1975 permitting construction of a “NEW 3 BEDROOM DWELLING W/ MAJESTICE FIREPLACE” upon subject TMK property which includes a notation by the applicant denoting the building permit was issued “FINAL ON 8/31/76”. Hawaii County Real Property Tax Office records show a Building Permit (B2007-1530K) for “EARTHQUAKE DAMAGE” was issued to the subject TMK to permit repairs, etc. and these repairs were “COMPLETED” on May 20, 2008.

In view of the County records, a building permit to construct original 2-story dwelling was permitted to be constructed upon “A-2a” or subject TMK property and completed or issued “FINAL” by the County-DPW in 1976 according to the applicant, approximately 32 years ago. In addition, a County DPW building permit was issued in 2007 permitting earthquake repairs to the original 2-story dwelling by the DPW and completed in 2008 according to DPW or County records.

4 **Agency Comments and Requirements-Variance Application (VAR 08-024:**

- a. The State Department of Health (DOH) memorandum dated April 17, 2008 states:

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

- b. The Department of Public Works (DPW) memorandum dated April 24, 2008 states in part:

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"We 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-Building Division memorandum dated April 23, 2008 states in part:

"We oppose 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."

5. **Notice to Surrounding Property Owners.** The applicant submitted copy of notices sent to surrounding property and affidavits that notices were mailed to surrounding property owners. According to the applicant's affidavits, the first and second notices were sent or mailed by US Mail to surrounding property owners on April 8, 2008 and April 21, 2008, respectively, by the applicant. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on April 25, 2008.
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 owners, submitted the variance application to address or resolve the portions of the dwelling built into and upon the property's minimum side yard and minimum rear yard approximately 32 years ago. The variance application's site plan map was prepared by a surveyor and denotes the location of the "2-STORY RESIDENCE" and other site improvements, "AS BUILT", on "LOT A-2b". According to the applicant, "the owners were unaware of any violation until survey conducted by Pattison Land Surveying, Inc. revealed on March 14, 2008 the encroachments, while the property is being prepared under seller's due

diligence for contemplated listing and sale". No evidence has been found to show indifference or premeditation by previous owners or builders in 1975-1976 to deliberately create or intentionally allow portions of the 2-story dwelling to be built into and upon the minimum side yard and minimum rear yard and attendant minimum side and minimum rear yard open yard spaces.

It appears that the 2-story dwelling improvements and recent repairs/improvements were constructed according to 2-building permits issued by the County-DPW to subject TMK property. It appears that during construction of the dwelling improvements between 1975 and 1976, the dwelling encroachment into and upon the property's minimum side yard and minimum rear yard went unnoticed by the owners, builder-contractor, and agencies.

ALTERNATIVES

Alternatives available to the applicant or owners to address and/or correct the building encroachments denoted on the survey map include the following actions:

1. Remove the building encroachments identified on the survey map and survey report or relocating the dwelling to fit within the correct building envelope prescribed by the Zoning Code.

Note: The front building setback line(s) and building envelope(s) denoted upon Lot A-2b and Lot A-2a taken from the property boundary line(s) shared with Lanikepu Place should be revised (10 feet wide future road widening setback line + minimum 20 feet front yard) to read "BUILDING SETBACK LINE 30.00 FEET".

2. Consolidation of Lot A-2b with adjoining lot (TMK: 6-6-004:091, Lot A-3 or 058) and resubdivision to modify respective side and rear property lines and/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.

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According to County building records, it appears that portions of the 2-story dwelling built into the property's minimum side yard and minimum rear yards approximately 36 years ago are not physically and/or visually obtrusive from the adjacent or abutting properties (Lot A-3 or parcel 058) and the right-of-way fronting the subject TMK property (Lanikepu Place). It appears that portions of the dwelling constructed approximately 32 years ago do not depreciate or detract from the character of the surrounding neighborhood and surrounding land patterns. Therefore, it is felt that portions of the 2-story dwelling, "AS-BUILT", into and upon minimum side yard and minimum rear yard identified and denoted on the variance application's site plan map will not detract from the character of the immediate neighborhood or the subdivision and may remain subject to variance and variance conditions.

The subject variance application was acknowledged by letter dated April 11, 2008 and additional time to 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 to September 19, 2008.

Based on the foregoing findings and circumstances, the variance 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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2. Portions of the 2-story dwelling or "2-STORY RESIDENCE", located upon "LOT A-2b" will not meet the minimum side yard and minimum rear yard and attendant minimum side yard and minimum rear yard open spaces pursuant to Chapter 25, the Zoning Code, according to the variance application's site plan map signed and dated March 14, 2008. The approval of this variance permits the "2-STORY RESIDENCE" or 2-story single family dwelling to remain, "AS BUILT", upon the subject TMK property or "LOT A-2b" according to the variance site plan map.

The applicant or current owners shall contact the DPW-Building Division in Kona to discuss the DPW-Building Division memorandum dated April 23, 2008 or make corrections if necessary prior to selling the subject property and/or prior of transfer of property title 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 this Variance Permit null and void.

Sincerely,



CHRISTOPHER J. YUEN
Planning Director

WRY:cs
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xc: Real Property Tax Office-Kona