

William P. Kenoi  
Mayor



Duane Kanuha  
Director

Bobby Command  
Deputy Director

West Hawai'i Office  
74-5044 Ane Keohokaloale Hwy  
Kailua-Kona, Hawai'i 96740  
Phone (808) 323-4770  
Fax (808) 327-3563

**County of Hawai'i**  
**PLANNING DEPARTMENT**

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

September 13, 2013

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

Dear Mr. Conventz:

**SUBJECT: VARIANCE APPLICATION – VAR-13-000147**  
**Applicant: KLAUS D. CONVENTZ/BAUMEISTER CONSULTING**  
**Owners: ERIC J. GELLER**  
**Request: Variance from Chapter 25, Zoning, Article 5, Division 1, Section 25-5-7, Minimum Yards and Article 4, division 4, Section 25-4-44(a), Permitted Projections into Yards and Open Space Requirements (Encroachment into East Front Yard Setback and Southwest Side yard Setback)**  
**TMK: 7-8-014:008, Lot 15-A**

After reviewing your variance application, the Planning Director certifies the **approval** of VAR-13-000147, subject to variance conditions. The variance will allow portion of the single-family dwelling with lanai to remain "as built" with a 13.9-foot to a minimum 14.10-foot front (east) yard setback with associated 9.6-foot front (southeast) yard open space. It also allows for the southwest corner of the single-family dwelling which is within the limits of the De Minimus regulation to remain with a 7.80 side yard setback. These exceptions are in lieu of the required 15-foot front yard setback with associated 10-foot front yard open space and 8-foot side yard setback, as required by the Hawaii County Code, Chapter 25, Zoning, Section 25-5-7, Minimum yards.

**BACKGROUND AND FINDINGS**

1. **Location.** The subject property, consisting of approximately 8,875 square feet of land, is located in the Kahalu'u Beach Lots and is situated at Puapua'a 1<sup>st</sup> and 2<sup>nd</sup>, North Kona, Hawai'i. The subject property's street address is 78-6620 Ali'i Drive.

2. **Zoning.** Single-Family Residence–7,500 sq. ft. (RS-7.5).
3. **State Land Use.** Urban (U).
4. **Required Setback.** 15 feet for front and rear; 8 feet for sides.
5. **Variance Application-Site Plan.** The applicant submitted the variance application, attachments, and filing fee on June 21, 2013, and other submittals related to the variance request and variance application. The variance application's site plan map is drawn to scale and prepared by Chrystal Thomas Yamasaki, L.P.L.S (Wes Thomas Associates) denotes the portions single-family dwelling built into the east front yard setback.  
  
The survey map shows that portions of the single family dwelling with lanai encroaches 0.9 feet and 1.10 feet into the 15-foot front (east) yard setback and .40 feet into the front (southeast) yard open space.
6. **County Building Records.** Hawaii County Real Property Tax Division records indicate that a building permit (192) was issued on January 11, 1973, for the construction of a 2-bedroom and 2 bath single-family residence.
7. **Agency Comments and Requirements.**
  - a. The State Department of Health (DOH) memorandum, dated July 10, 2013. (See attached memorandum)
  - b. No comments were received from the Department of Public Works–Building Division.
8. **Notice to Surrounding Property Owners.** The applicant submitted a copy of notice mailed to surrounding property owners (including affidavits) by U.S.P.S. According to these submittals, the first and second notice(s) were mailed on June 21, 2013 and July 8, 2013, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on June 11, 2013.
9. **Time Extension.** The applicant's variance application was received on July 1, 2013 and additional time to review the application was required. The applicant granted the Planning Director an extension of time to issue a decision on the Variance Application until September 15, 2013.
10. **Comments from Surrounding Property Owners or Public.** No written comments or objections from surrounding property owners or general public were received by the Planning Department.

### ANALYSIS OF GROUNDS FOR VARIANCE

No variance will be granted unless it is found that:

- (a) *There are special or unusual circumstances applying to the subject real property which exist either to a degree which deprives the owner or applicant of substantial property rights that would otherwise be available, or to a degree which obviously interferes with the best use or manner of development of the property.*

The variance application meets criteria (a) for the following reasons:

The owner/applicant submitted the variance application to address or resolve the encroachment of the single-family dwelling with lanai into the 15-foot east front yard setback as required by the Zoning Code.

The survey map prepared by Chrystal T. Yamasaki L.P.L.S. (Wes Thomas Associates) shows that portions of the single family dwelling with lanai encroaches 0.9 feet and 1.10 feet into the 15-foot front (east) yard setback and .40 feet into the front (southeast) yard open space.

No evidence has been found to show indifference or premeditation by the past owners or builders to deliberately create or intentionally allow the building encroachment problems to occur. It appears that the original dwelling improvements constructed nearly 40 years ago were constructed under valid building permits and other construction permits issued by the County. It also appears that past building permits inspections of the premises by the agencies during construction of the dwelling improvements did not disclose any building encroachment issues or building setback irregularities at that time. Further, due to the approximate 0.9 feet and 1.10 feet encroachments into the front (eastern) yard setback of the property, it appears that this was a staking error and not intentional.

The southwest corner of the single-family dwelling encroaches .20 feet (2.4 inches) into the 8-foot side yard setback which is qualifies under the "De Minimus" regulations of the Zoning Code.

The above special and unusual circumstance determines the owner was not at fault in creating the encroachment violation and requiring them to fix the encroachments would interfere with the best use and development of the property.

- (b) *There are no other reasonable alternatives that would resolve the difficulty.*

The variance application meets criterion (b) for the following reasons:

Alternatives available to the current owners to correct and/or address the building encroachments constructed into the affected east side yard setback of the subject property include the following actions:

Remove the building encroachments and/or redesign or relocate the single-story dwelling constructed upon the subject property to fit within the correct building envelope denoted on the recent survey map as prescribed by the Zoning Code. Any structural or design correction of the single-family dwelling to meet setback requirement would leave unattractive reconstruction scars.

Because the encroachment is within the front yard setback, to consolidate the subject property, with the roadway and to re-subdivide the property to modify property lines and adjust minimum front yard setbacks is not a viable option. Therefore, there are no reasonable alternatives to resolve the encroachment issue.

- (c) *The variance is consistent with the general purpose of the district, the intent and purpose of this chapter, and the general plan, and will not be materially detrimental to the public's welfare or cause substantial, adverse impact to an area's character or to adjoining properties.*

The variance application meets criteria (c) for the following reasons:

The intent and purpose of requiring building setbacks on a lot are to assure that adequate air circulation and exposure to light are available between permitted structure(s)/uses and boundary/property lines.

The encroachment of .9 and 1.10 feet into the front (eastern) yard setback area is miniscule, but it exceeds the limit of falling under the De Minimus exception. The granting of the setback variance still allows for adequate air circulation as the affected area is within the front setback adjacent to roadway frontage. The southwest corner of the single-family dwelling which encroaches .20 feet (2.4 inches) into the side yard setback is within the limit of the De Minimus regulation.

Based on the foregoing findings and unusual circumstances, the applicant's request for variance would be consistent with the general purpose of the zoning district and the intent and purpose 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. This can be substantiated, to some degree, by the fact that this office did not receive any complaints from surrounding property owners during the roughly 40 years since the single family dwelling with lanai was constructed. Further, objections were not received from the surrounding property owners or general public in

response to the Notification of Surrounding Property Owners. As such, it is felt that the issuance of this variance will not depreciate or detract from the character of the immediately surrounding properties.

Based on the above findings, granting of the variance would be consistent with the criteria and intent of approving a variance.

### **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. No permit shall be granted to allow an ohana or second single family or farm dwelling upon the subject property, subject to provisions of the Zoning Code or State law which may be changed from time to time.
4. Portion of the single-family residence with lanai built upon the subject property ("LOT 15-A") will not meet the minimum front yard requirements pursuant to Hawai'i County Code, Chapter 25, (Zoning Code), in accordance to the site map dated June 11, 2013.
5. This variance does not apply to the encroachment issue regarding the concrete rock masonry (CRM) wall. These issues shall be addressed by the property owners affected by the CRM wall encroachments.
6. The concrete rock masonry (CRM) wall located into the County of Hawai'i road right-of-way (Ali'i Drive) shall be removed or relocated out of the road right-of-way within one-year from the issuance of this variance.
7. Should the single-family dwelling with lanai (footprint) on the subject property be destroyed by fire or other natural causes, the replacement structure shall comply with the Hawai'i County Code, Chapter 25, (Zoning) and be subject to State law and County ordinances and regulations pertaining to building construction occupancy.
8. Future or new building improvements and permitted uses shall be subject to State law

Klaus D. Conventz  
Baumeister Consulting  
Page 6  
September 13, 2013

and County ordinances and regulations pertaining to building construction and occupancy.

Should any of the foregoing variance conditions not be complied with, the Planning Director may proceed to declare subject Variance VAR-13-000147 null and void.

Sincerely,

A handwritten signature in black ink, appearing to read 'Duane Kanuha', written in a cursive style.

DUANE KANUHA  
Planning Director

LHN:nci

P:\Admin Permits Division\Variances From CoH02\Zone7\VAR13-000147TMK7-8-014-008Geller.doc.rtf

xc: Planning Department (Kona)  
Real Property Tax Division (Kona)  
Gilbert Bailado, Planning GIS