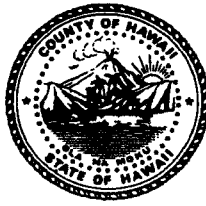


Harry Kim
Mayor

Roy Takemoto
Managing Director

West Hawai'i Office
74-5044 Ane Keohokālole Hwy
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County of Hawai'i

PLANNING DEPARTMENT

Michael Yee
Director

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Phone (808) 961-8288
Fax (808) 961-8742

February 24, 2020

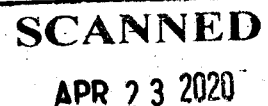
Sidney Fuke, Planning Consultant
100 Pauahi Street, Suite 212
Hilo, Hawai'i 96720

Dear Mr. Fuke:

SUBJECT: Application: Variance - VAR 19-000539
Applicant: SYDNEY FUKE
Owners: DONALD R./LINDA S. FISCHBACH TRUST
Request: Variance from Chapter 25, Zoning, Article 5,
Division 1, Section 25-5-56, Minimum Yards Requirements
and Section 25-4-44 Permitted Projections into Yards and
Open Spaces
(Encroachments into Southeast Front Yard Setback and
Open Space)
Tax Map Key: 7-6-012:118 Lot 2-A-3

Upon further review of our files, and review of the submitted variance application, attachments, associated materials including the applicant's survey map and survey report dated June 1, 2014, prepared by Kevin McMillen, LPLS, submitted on July 29, 2019, it was determined that the encroachments on the subject parcel, were previously approved by Variance No. 05-053 (copy attached). The Planning Director hereby re-certifies the **approval** of Variance No. 05-053 with Variance No. 19-000539, with a new survey map and survey report dated June 1, 2014, subject to conditions.

Variance No. 05-053 was previously certified for approval by the Planning Director on April 28, 2006, subject to variance conditions. Variance No. 05-053 was granted to allow portions of a 2-story dwelling to remain with a minimum 22.5-foot front (southeast) yard setback, in lieu of the required 25-foot front yard and roof overhangs (eaves) to remain with minimum 18.0-foot open space requirement in lieu of 19-foot required open space requirement. The variance also allows a raised walkway to remain with a minimum 5.6-foot front (southeast) yard setback, in lieu of the required 25-foot front yard and in lieu of 19-foot required open space requirement. These exceptions were allowed in lieu of the required 25-foot front yard setback and 19-foot front yard open space, as required by the Hawai'i County Code, Chapter 25, Zoning, Article 5, Division 1, Section 25-5-56 (1), Minimum yards and Article 5, Division 4, Section 25-4-44 (a), Permitted projections into yards and open space requirements.



The Planning Director re-certifies the approval of Variance no. 05-053, by granting the approval Variance No. 19-000539, with a new survey map and survey report dated June 1, 2014, subject to conditions.

BACKGROUND AND FINDINGS

1. **Location.** The subject property, consisting of 23,788 square feet, is situated in the 'Io View Estates Subdivision, North Kona, Hawai'i. The subject property's street address is 76-769 'Io Place and is identified by TMK: (3) 7-6-012: 118.
2. **County Zoning.** Residential-Agriculture – .5 acre (RA-.5a)
3. **State Land Use Designation.** Rural.
4. **Setback Requirements.** 25 feet front and rear; 15 feet for sides measured from the easement line.
5. **Variance Application.** The applicant/owner submitted the variance application, attachments, filing fee, and associated materials on July 29, 2019. The variance application's survey map dated June 4, 2014 was prepared by Kevin McMillen, LPLS, and denotes that portions of the dwelling walls are built into the front (southeast) yard, and roof overhangs (eaves) are built into the required front (southeast) open space requirement, and that a raised walkway is built into the front (southeast) yard and open space requirement. **(See Exhibit A-Site Plan)**

The encroachment of portions of the 2-story dwelling of 2.5-feet leaves a minimum 22.5-foot (southeast) front yard setbacks, in lieu of the required 25 foot front yard setback, and portions of the roof overhangs (eaves) encroaching 1.0-foot, leaving a minimum 18.0-foot front (southeast) open space, in lieu of the 19-foot open space requirement, and encroachment of the raised walkway leaves a minimum 5.6- foot front (southeast) yard, encroaching 19.4-feet into the 25.0-foot front (southeast) yard and encroaching 13.4 feet into the required 19.0 feet, leaving a minimum 5.6 open space requirement.

These exceptions are in lieu of the required 25-foot front yard setback and 19-foot front yard open space, as required by the Hawai'i County Code, Chapter 25, Zoning, Article 5, Division 1, Section 25-5-56 (1), Minimum yards and Article 5, Division 4, Section 25-4-44 (a), Permitted projections into yards and open space requirements.

6. **County Building Records** Hawai'i County Real Property Tax Office (RPT) records indicates that a building permit (#026099) was issued on August 2, 2002 a single-family dwelling with 3 bedrooms, 2-1/2 baths, living room, kitchen, dining area, lanais, entry, porch, bridge, recreation room, and garage. An additional permit (#B2006-0943K) was issued on

June 2, 2006 for a swimming/lap pool. Additional electrical and plumbing permits (E035180 and M025913) were issued on January 27, 2003 and September 26, 2003, respectively, that appear to be associated with the dwelling

7. Agency Comments and Requirements.

- a. State Department of Health (DOH) memo dated September 6, 2019. "The Health Department found no environmental health concerns with regulatory implications in the submittals."
- a. No comments were received from Department of Public Works - Building Division as of this date.

8. Public Notice. The applicant filed a transmittal letter with copy of the notices sent to surrounding property owners via USPS. According to USPS certificate of mailing receipts and affixed postal receipts, the second mailings of the first and second notices were mailed on August 16, 2019. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on August 27, 2019.

9. 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.

10. Time Extension. The applicant's variance application was acknowledged by emails dated December 5, 2019, January 22, 2020, and February 24, 2020, with a time extension extended to March 31, 2020.

GROUNDINGS FOR APPROVING VARIANCES

Special and Unusual Circumstances

- (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 criterion (a) for the following reasons:

The previous owner/applicant submitted the original variance application on August 12, 2005 to address or resolve the encroachment of the portion of the dwelling wall, roof overhangs (eaves) and a raised walkway that encroach into the 25-foot front (southeast) yard and open space requirement as required by the Zoning Code. Another variance application was submitted on behalf of the new owners on July 29, 2019.

It was determined that the encroachments on the subject parcel, were previously approved by Variance No. 05-053. The Planning Director previously certified the approval of Variance No.

05-053, on April 28, 2006, subject to variance conditions to allow portions of a 2-story dwelling to remain with a minimum 22.5-foot front (southeast) yard setback, in lieu of the required 25-foot front yard and roof overhangs (eaves) to remain with minimum 18.0-foot open space requirement in lieu of 19-foot required open space requirement. The variance also allows a raised walkway to remain with a minimum 5.6-foot front (southeast) yard setback, in lieu of the required 25-foot front yard and in lieu of 19-foot required open space requirement. These exceptions were allowed in lieu of the required 25-foot front yard setback and 19-foot front yard open space, as required by the Hawai'i County Code, Chapter 25, Zoning, Article 5, Division 1, Section 25-5-56 (1), Minimum yards and Article 5, Division 4, Section 25-4-44 (a), Permitted projections into yards and open space requirements.

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 constructed in 2003, approximately 17 years ago, and it also appears that past building permit inspections of the premises by the affected agencies during construction of the dwelling improvements did not disclose any building encroachment issues or building setback irregularities at that time.

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

Alternatives

(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 side yard of the subject property include the following actions:

Remove the building wall encroachments and/or redesign the dwelling denoted on the survey map to fit within the correct building envelope as prescribed by the Zoning Code. This alternative would be deemed unreasonable, especially when the owners complied with the building permit process and were under the impression that the single-family dwelling was in compliance with all County requirements. Any structural or design correction of the single-family dwelling to meet setback requirement would leave unattractive reconstruction scars.

There are no reasonable alternatives to resolve the encroachment issue.

Intent and Purpose

(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 welfare or cause substantial, adverse impact to an area's character or to adjoining

properties.

The Variance application meets criterion (c) for the following reasons:

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

It was determined that the encroachments on the subject parcel, were previously approved by Variance No. 05-053. The Planning Director previously certified the approval of Variance No. 05-053, on April 28, 2006, subject to variance conditions to allow portions of a 2-story dwelling to remain with a minimum 22.5-foot front (southeast) yard setback, in lieu of the required 25-foot front yard and roof overhangs (eaves) to remain with minimum 18.0-foot open space requirement in lieu of 19-foot required open space requirement. The variance also allows an elevated walkway/bridge to remain with a minimum 5.6-foot front (southeast) yard setback, in lieu of the required 25-foot front yard and in lieu of 19-foot required open space requirement. These exceptions were allowed in lieu of the required 25-foot front yard setback and 19-foot front yard open space, as required by the Hawai'i County Code, Chapter 25, Zoning, Article 5, Division 1, Section 25-5-56 (1), Minimum yards and Article 5, Division 4, Section 25-4-44 (a), Permitted projections into yards and open space requirements.

Therefore, the variance would be consistent with the general purpose of the zoning district and not be materially detrimental to the public's welfare or cause substantial adverse impact to the area's character or to adjoining properties.

PLANNING DIRECTOR'S DECISION AND VARIANCE CONDITIONS

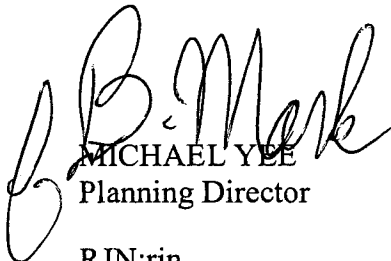
Based on the variance application's survey map dated June 1, 2014, prepared by Kevin McMillen, LPLS, , the single-family dwelling, roof overhangs and an elevated walkway/bridge built on the subject property ("LOT 2-A-3") will not meet the minimum front yard and open space side yard requirements pursuant to Hawai'i County Code, Chapter 25, (Zoning Code)f, and was previously approved by VAR-05-053 on April 28, 2006..

This variance application is re-approved subject to the following variance 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 Hawai'i 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 located on "Lot 2-A-3" will not meet the minimum front yard and attendant minimum front yard open space pursuant to Chapter 25, the Zoning Code, according to the variance application's (VAR-05-053) site map and survey report dated April 18, 2005 and variance application (VAR-19-000539) survey map and survey report dated June 1, 2014. The approval of this variance permits the "Dwelling" (including attached lanais, garage, and elevated walkway/bridge) improvements to remain, "AS BUILT", on the subject TMK property or "LOT 2-A-3" according to the variance site plan map and survey report signed and dated June 1, 2014.
4. An Ohana Dwelling permit shall not be approved for the subject property, subject to the provisions of the Hawai'i County Code, Chapter 25, (Zoning) 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.
6. Should any of the foregoing variance conditions not be complied with, the Planning Director may initiate proceedings to null and void Variance-19-000539.

Sincerely,



MICHAEL YEE
Planning Director

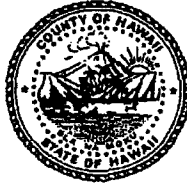
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\\Coh33\planning\public\Admin Permits Division\Variance\2019\VAR-19-000539 Fischbach Trust Setback\apprvl - revised.doc

xc: Natalie Whitworth, DPW Engineering Division
Real Property Tax Office (Kona)
Gilbert Bailado, GIS

Donald R. and Linda S. Fischbach Trust
520 E. Summerdale Ct.
Fresno, CA 93720-0893

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

April 28, 2006

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

Dear Mr. Conventz:

VARIANCE PERMIT-VAR 05-053

Applicant: KLAUS D. CONVENTZ
Owners: JAMES A. RUIZ, ET AL.
Request: Variance from Minimum Yards
Pursuant to Chapter 25, Zoning
Tax Map Key: 7-6-012:118, Lot 2-A-3

After reviewing your application and the information submitted, the Planning Director certifies the approval of your variance request subject to variance conditions. Variance Permit VAR 05-053 allows portions of a 2-story dwelling to remain on Lot 2-A-3, "AS-BUILT", with a minimum 22.5 feet front yard and attendant minimum 5.6 feet to 18.0 feet front yard open space in lieu of the minimum 25.00 feet front yard and attendant minimum 19.00 feet front yard open space requirements measured between an easement line and respective building improvements according to the variance site plan map dated and signed on April 18, 2005. The variance is from the TMK property's minimum yard and attendant open yard space requirements pursuant to the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 5, Section 25-5-56, Minimum yards, (1), 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, Lot 2-A-3 containing 23,786 square feet, being a portion of R.P. 4475 L.C. Award 7713 Apana 43 to Kamamalu, is situated at Holualoa 1st and 2nd, North Kona, Hawaii. The property's street address is 76-0769 'Io Place.

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Mr. Klaus D. Conventz
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The property is zoned Residential and Agricultural (RA-.5a) by the County and designated Rural or "R" by the Land Use Commission (LUC).

2. **Variance Application-Site Plan.** The applicant submitted the variance application, attachments, and filing fee on or about May 31, 2005 by 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 April 18, 2005 denotes portions of the "Dwelling" were built within the minimum 30 feet front yard and attendant minimum 24 feet front yard open space of "LOT 2-A-3" or subject TMK property.

The applicant's background states in part:

"Owners were unaware of any problems when a setback survey conducted by KKM-Surveys on April 18, 2005, revealed the encroachments, while the property was subject to escrow procedure for conveyance."

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

3. **County Building Records:**

County building records show building permit (026099), electrical permit (E035180), and mechanical (M025913) or plumbing permit were issued by the DPW to subject TMK property. It appears that the "Dwelling" on "LOT 2-A-3" was built pursuant to the building and associated construction permits issued between 2002 and 2003.

4. **Agency Comments and Requirements-VAR 05-053:**

- a. The Department of Public Works (DPW) memorandum dated September 2, 2005 states in part:

"Buildings shall conform to all requirements of code and statues pertaining to building construction, (see attached memorandum from our Building Division)."

Mr. Klaus D. Conventz
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Note: The above memorandum did not include any DPW-Building Division memorandum.

- b. The State Department of Health (DOH) memorandum dated September 13, 2005 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 May 30, 2005 and August 16, 2005, respectively, by the applicant. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on or about August 18, 2005.
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 front yard. 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 2-A-3". The current owners became aware of building encroachment within the property's front yard during escrow. No evidence has been found to show indifference or premeditation by the owners or builders to deliberately create or intentionally allow these building encroachments to be built within the affected front yard.

It appears that the existing dwelling improvements and subsequent dwelling improvements were constructed according to a building permit and other associated construction permits issued to subject TMK property. It appears that during construction of the dwelling improvements between 2002 and 2003, the dwelling encroachment within the property's front yard and attendant front yard open space went unnoticed.

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ALTERNATIVES

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

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 property with the Right-of-Way fronting the property 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 3 to 4 years ago within the property's minimum front yard are not physically and/or visually obtrusive from the adjacent property or right-of-way ("Io Place). It appears that these 3 to 4 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 within the property's minimum front yard and attendant minimum front yard open space identified on the variance application's site plan map and survey report will not detract from the character of the immediate neighborhood or the subdivision.

The subject variance application was acknowledged by letter dated August 11, 2005 and additional time to complete the variance background report and 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.

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 located on "LOT 2-A-3" will not meet the minimum front yard and attendant minimum front yard open space pursuant to Chapter 25, the Zoning Code, according to the variance application's site plan map and survey report dated April 18, 2005. The approval of this variance permits the "Dwelling" (including attached lanais, garage, and elevated walkway/bridge) improvements to remain, "AS BUILT", on the subject TMK property or "LOT 2-A-3" according to the variance site plan map and survey report signed and dated April 18, 2005.

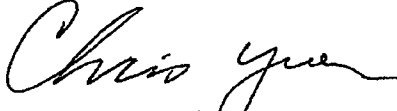
The applicant or current owners shall address the status of the "open" Building Permit-BP No. 026099 issued to subject TMK property. This active or "open" building permit issued to subject TMK property shall be closed or "finalized" by the DPW-Building Division prior to sale of the property or transfer of title of the property by the current owner(s) to others or by June 30, 2006.

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.

Mr. Klaus D. Conventz
dba Baumeister Consulting
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April 28, 2006

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