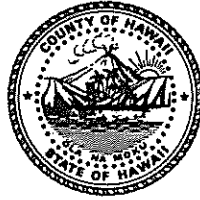


Stephen K. Yamashiro  
Mayor



## County of Hawaii

### PLANNING COMMISSION

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CERTIFIED MAIL

Z 095 323 942

AUG 21 1997

Michael Thomas, Esq.  
Suite 204 Parker Square  
65-1279 Kawaihae Road  
Kamuela, Hi 96743

Dear Mr. Thomas:

Shoreline Setback Variance Application No. 97-1  
Applicant: Terry Zerngast  
Request: Allow Existing/Proposed North Wall Roof Overhang,  
Steps and Deck Corner within the 20-Foot Shoreline Setback Area  
Tax Map Key: 7-8-14:78

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The Planning Commission at its duly held public hearing on August 7, 1997, voted to approve the above-referenced application and adopt the Report of Contested Case Hearing Officers, Findings of Fact and Conclusions of Law, Decision and Order, with conditions. Shoreline Setback Variance No. 652 is hereby issued to allow the existing/proposed north exterior wall lanai, roof overhang and steps, and deck corner within the 20-foot shoreline setback area. The property is located within the Kahaluu Beach Lots on the makai side of Alii Drive approximately 1,000 feet north of Kahaluu Beach Park at Kahaluu, North Kona, Hawaii.

Approval of this request is based upon the following:

On May 1, 1997, June 14, 1997 and August 7, 1997, in the County of Hawaii, the County of Hawaii Planning Commission held public hearings and contested case hearings on the application of Terry Zerngast for a Shoreline Setback Variance Application, SSV 97-1, a request to allow existing/proposed north wall roof overhang, steps and deck corner within the 20-foot shoreline setback area. The June 14, 1997 portion of the contested case hearing was held before a panel of hearing officers consisting of Commission Chair

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AUG 21 1997

Kevin M. Balog, Presiding Officer, Commissioners Mildred Mosher and James Souza. County of Hawaii Deputy Corporation Counsel Frederick Giannini was present as legal adviser to the hearing officers. In attendance were Intervenors John and Nancy Pearne (the "Pearnies"), and Michael Matsukawa, Esq. appearing on behalf of the Pearnies; Jerry M. Hiatt, Esq. and Michael W. Thomas, Esq. appearing on behalf of Applicants Terry Zerngast, Alfred Benaroya and Neil Benaroya (the "Applicants"); and Virginia Goldstein appearing on behalf of the Planning Department.

### FINDINGS OF FACT

1. This contested case hearing arises out of Applicants' Request for Shoreline Setback Variance, No. 97-1 (the "Variance") for that certain property located at 78-6640 Alii Drive, Kahaluu, North Kona, Hawaii TMK: (3)7-8-14:78 (the "Property").

2. On May 1, 1997, the Pearnies demanded a Contested Case Hearing on the Variance. In written Exhibits submitted on June 9, 1997, by the Planning Department, Virginia Goldstein, the Planning Director, recommended approval of the Variance.

3. In 1963, the original single-family dwelling was constructed on the Property. That original construction established the footprint of the building which, with minor exceptions of only approximately 4 to 6 inches at the North wall, sits on the Property today. In 1990, a hui led by Jerry Morey purchased the Property with plans to renovate the existing improvements and landscape the Property. The current Applicants were either the minority partners in that hui, or had not yet even become owners of the Property at the time the building permits for the Property were issued. The current Applicants did not have decision making authority for the hui at the time and they left such decisions to Mr. Morey.

4. The Property is situated within the Kahaluu Beach Lots which runs approximately 1 mile along the shoreline. The Property consists of approximately 9,975 square feet of improved lands. The Property is fully developed with an existing seawall which was certified by the Department of Land and Natural Resources on August 6, 1992. This wall is 4.5 to 7.5 feet above the natural grade of land adjacent and seaward of the existing seawall. The surrounding areas consist of single family dwellings.

5. The requested Variance has been processed in accordance with Rule 8, Section 8-14(b)(3) which states: A variance may also be granted upon a finding that, based upon the record, the proposed structure or activity meets one of the following standards of this subsection:

(3) Hardship Standard.

(A) A structure or activity may be granted a variance upon grounds of hardship only if:

(i) The applicant would be deprived of reasonable use of the land if required to comply fully with this rule; and

(ii) The request is due to unique circumstances and does not draw into question the reasonableness of this rule; and

(iii) The request is the practicable alternative which best confirms to the purpose of this rule.

(B) Before granting a hardship variance, the Commission must determine that the request is a reasonable use of the land. The determination of the reasonableness of the use of land shall consider factors such as shoreline conditions, erosion, surf and flood condition, and the geography of the lot as it relates to health and safety.

6. In 1992, Hurricane Iniki severely damaged the improvements on the Property. After the hurricane, plans were drafted to rebuild the improvements using the original building footprint. The plans and specifications were prepared by H. C. Bennett and were approved by the County. Building permits ("Permits") were issued in August 1994 for the work called for in the plans. Work commenced on the Property in reliance on the legality of the construction called for in the plans and the work progressed to the point where the building was framed, enclosed and roofed.

7. A Stop Work Order was issued in November 1994, and a Notice of Violations was sent on February 6, 1995 (the "Notice of Violations"). At that point work on the Property ceased.

8. On January 11, 1996, the Applicants notified the Planning Director of their willingness to enter into a negotiated settlement of all issues related to the Stop Work Order and the legality of the construction on the Property. Discussions outlining the terms of settlement followed.

9. On October 18, 1996, the Applicants and the County of Hawaii executed a Settlement and Mutual Release Agreement (the "Settlement Agreement") which fully and finally resolved all existing disputes and violations concerning the Property with the County.

10. Both the Applicants and the County performed their obligations pursuant to the terms of the Settlement Agreement in good faith. The Applicants submitted zoning and shoreline setback variance applications for approval as contemplated by the Settlement Agreement. The Stop Work Order was lifted by the County.

11. The Parnes filed objections to the Zoning and Shoreline Setback Variance Applications and filed a Petition for Standing in a Contested Case Hearing with respect to the Shoreline Setback Variance Application.

12. Based on the testimony of the General Contractor, Mr. Woodbury and Mr. Conventz, if the Variance is not granted, the buildable area of the Property would be reduced to approximately 2,400 square feet. After deducting the driveway and other needed appurtenances that would leave only approximately 764 square feet for a residential dwelling. Based on the same testimony, if the Variance is not granted, the Applicants would be required to incur approximately \$108,000 to tear down existing improvements on the Property so as to remove them from the shoreline setback area before seeking the necessary permits to build a much smaller residence not to exceed 764 square feet, under all currently existing restrictions.

13. The amount of space on the Property which is available for construction in that event is not usable, for all practical purposes, as a dwelling. This fact would indeed deprive the Applicants of any practical economic use of the Property except as, perhaps, a parking lot. No testimony or exhibits were offered by the Parnes or any other party to dispute these facts.

14. The current shoreline certification did not exist until 1992 when the shoreline was changed to its current location. Under the prior shoreline certification, the improvements on the Property as currently planned would not have encroached into the shoreline setback and would have been in compliance with applicable law.

15. The current improvements on the Property with the encroachments into the shoreline setback do not adversely affect or cause harm to the Parnes property, nor do they otherwise limit the Parnes access to the shoreline.

16. The Parnes do not reside on their property. They rent it to others. The Parnes did not appear at the hearing to testify. Their tenants also did not appear to testify. In addition, no testimony was offered on behalf of the Parnes by others on the issues of whether the Parnes or any other neighbor would suffer hardship if the Variance is granted, whether there would be harm to the Parnes or any other neighbor's property if the Variance is granted, or whether there would be any limitation of access from or to the property of the Parnes or any other neighbor if

the Variance is granted. The Commission therefore finds that no such hardship, harm or limitations exist as to the Pearnas or any other neighbor's property if the Variance is granted.

17. The determination of the reasonableness of the use of land must consider factors such as shoreline conditions, erosion, surf and flood conditions, and the geography of the lot as it relates to health and safety.

18. The natural shoreline processes will experience minimal interference, if any, from the proposed improvements. There may be some visual impact from the project, however, the surrounding property will be left in its present state. The proposed improvements will not interfere with public access to shoreline areas or existing view planes as designed. There are no air quality monitoring stations in the West Hawaii Region. The existing noise generated in the area come from the noise from Alii Drive traffic at the mauka side of the Property. The principal source of short term air quality impacts associated with the construction of the proposed improvements, is expected during construction. Given the limited nature of the improvements, no long term air and noise quality impacts are likely. The requested Variance is the most practicable alternative which best conforms to the purpose of the applicable Rule.

19. Hardship will be caused to the Applicants if the proposed improvements are not allowed within the shoreline setback area and the Applicants would be deprived of reasonable use of their land if the Variance is not approved.

20. Approval of this request will allow for a reasonable use of land which will not effect the shoreline views, public access, the environment, or the ecology of the shoreline.

21. The proposed development is consistent with the County General Plan and Zoning Code. The proposed project does conform to the General Plan Land Use Patter Allocation Guide (LUPAG) Map, which designates this area as Medium Density. Medium Density allows for development for village and neighborhood commercial, residential, and related functions. The area is zoned, Single Family Residential (RS-7.5). Therefore, it is determined that the request is consistent with the urban form depicted on the LUPAG Map for this area for North Kona.

22. The proposed use will compliment the following goals, policies and standards of the Land Use and Residential Elements of the General Plan:

(A) **Environmental Quality:**

- The County of Hawaii shall take positive action to further maintain the quality of the environment for residents both in the present and in the future.

(B) **Natural Resources and Shoreline:**

- Protect and conserve the natural resources of the County of Hawaii from undue exploitation, encroachment and damage.
- Protect and promote the prudent use of Hawaii's unique, fragile, and significant environmental and natural resources.
- Ensure that alterations to existing land forms and vegetation, except crops, and construction of structures cause minimum adverse effect to water resources, and scenic and recreational amenities and minimum danger of floods, landslides, erosion, siltation, or failure in the event of earthquake.

Based on all of the above findings, it is determined that the proposed improvements are consistent with the Shoreline Setback Law pursuant to Chapter 205-31 and the criteria established in Rule No. 8 of the Planning Commission's Rules of Practice and Procedure.

23. Any Finding of Fact which is deemed to be a Conclusion of Law shall be treated as a Conclusion of Law.

CONCLUSIONS OF LAW

1. The purpose of shoreline setbacks are to protect the natural shoreline and to prevent erosion of the shore. Additionally, shoreline setbacks exist to protect the shoreline for public use and enjoyment.

2. The applicable criteria for granting approval of the Variance in this case is the hardship standard under Rule 8-10(b)(3). If the Variance is not granted the buildable area on the Property would be reduced dramatically resulting in the inability of Applicants to build a reasonable residence on the Property or make any other practical use of it, except as perhaps a parking lot. In light of the facts of this case, there are, as a matter of law, unique circumstances which were and are beyond the control of the Applicants. The Applicants therefore meet the hardship standard set forth above. The Commission finds that the use with the requested Variance is a

reasonable use of the Property considering the use of the land, shoreline conditions, erosion, surf and flood condition, and the geography of the lot as it relates to the applicant and adjacent property owners' health and safety.

3. Once the Applicants learned of the Notice of Violations, they made good faith and reasonable efforts to address those violations and enter into a negotiated settlement with the County of Hawaii to correct those violations. Both sides have performed their obligations under the settlement in good faith. Both sides had authority to enter into the Settlement Agreement and it is a valid, binding and enforceable agreement as to all parties and all issues addressed therein.

4. It would not be practicable to remove a large portion of the structure which encroaches into the shoreline setback since the cost could exceed \$108,000 and result in a buildable area which is unreasonably small. The Applicants intend to use the Property as a residence which is, as a matter of law, a reasonable use of land in a neighborhood zoned for residential use. The use of Property as a residence will have no effect on the shoreline and will not cause environmental harm to the Property or the properties of other neighbors, including the Pearnés.

5. The Commission concluded, as a matter of law, that approval of this Shoreline Setback Variance meets each applicable legal standard including, but not limited to, those expressly referenced herein. The Commission also approves the Variance subject to the following conditions identified by the Planning Director in her recommendations.

#### DECISION AND ORDER

After review of all of the testimony and evidence, the Report of Contested Case Hearing Officers, Findings of Fact and Conclusions of Law, Decision and Order and the parties' comments at the August 7, 1997 hearing, the County of Hawaii Planning Commission hereby grants Shoreline Setback Variance Application 97-1 to Terry Zerngast, subject to the following conditions:

1. The applicant, its successor or assigns shall be responsible for complying with all stated conditions of approval.
2. The applicant shall comply with the requirements of Department of Public Works.
3. Construction of the proposed development shall be commenced within one (1) year from the effective date of this permit.

4. The applicant shall comply with Special Management Area Use Permit Assessment Application No. 96-97 and Variance Application No. 804 (WHVAR96-70).

5. Before construction or any land alteration activities occurs within the subject property, the 20-foot shoreline setback shall be measured, staked, and roped with a continuous flagline by a registered surveyor. The Planning Department shall be notified to conduct a site inspection of the subject property to verify the location of the flagline prior to commencing any construction or land alteration activities and subsequently, after completion of the single family dwelling. The flagline shall be left in place for the duration of construction activities within the subject property.

6. Should any unidentified sites or remains such as artifacts, shell, bone, or charcoal deposits, human burials, rock or coral alignments, paving, or walks be encountered, work in the immediate area shall cease and the Planning Department shall be immediately notified. Subsequent work shall proceed upon an archaeological clearance from the Planning Department when it finds that sufficient mitigative measures have been taken.

7. An extension of time for the performance of conditions within the permit may be granted by the Planning Director upon the following circumstances:

- A. The non-performance is the result of conditions that could not have been foreseen or are beyond the control of the applicant, successors or assigns, and that are not the result of their fault or negligence.
- B. Granting of the time extension would not be contrary to the General Plan or Zoning Code.
- C. Granting of the time extension would not be contrary to the original reasons for the granting of the permit.
- D. The time extension granted shall be for a period not to exceed the period originally granted for performance (i.e., a condition to be performed within one year may be extended for up to one additional year).

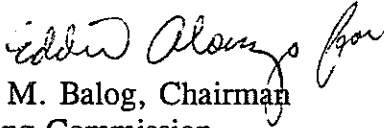


Michael Thomas, Esq.  
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This approval does not, however, sanction the specific plans submitted with the application as they may be subject to change given specific code and regulatory requirements of the affected agencies.

Should you have any questions, please feel free to contact Alice Kawaha or Susan Gagorik of the Planning Department at 961-8288.

Sincerely,



Kevin M. Balog, Chairman  
Planning Commission

xc: Planning Director  
Terry Zerngast  
Klaus Conventz  
West Hawaii Office.  
Department of Public Works  
Department of Water Supply  
County Real Property Tax Division  
Office of State Planning, CZM Program (w/Background)  
Department of Land and Natural Resources

EFFECTIVE DATE: AUG 21 1997