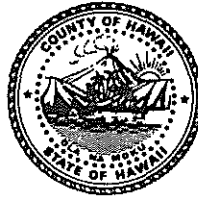


Stephen K. Yamashiro  
Mayor



## County of Hawaii

### PLANNING COMMISSION

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CERTIFIED MAIL

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JUN 26 1998

Steven S. C. Lim, Esq.  
Carlsmith Ball Wichman Case & Ichiki  
121 Waianuenue Avenue  
Hilo, HI 96720

Dear Mr. Lim:

Shoreline Setback Variance Application (SSV 97-3)  
Applicant: Dale and Veronica Clemens  
Request: After-the-Fact Improvements of Existing Seawall, Planter and Boundary  
Wall and Backfill/Lawn Improvements, and Proposed Lap Pool Improvements  
Tax Map Key: 7-8-14:51

The Planning Commission at its duly held public hearing on June 19, 1998, voted to partially approve the above-referenced application. Shoreline Setback Variance Permit No. 653 is hereby issued to allow the after-the-fact improvements of the existing single family dwelling, seawall, planter and boundary wall, and backfill/lawn improvements. The request for the proposed construction of lap pool improvements within the 20-foot shoreline setback area was denied. The property is located in the North Kahaluu Beach Subdivision on the makai side of Alii Drive and approximately 0.2 mile north of Kahaluu Beach Park at Kahaluu, North Kona, Hawaii.

The Commission also voted to accept Dr. Elizabeth Marshall's letter dated June 15, 1998, notifying them of her intent to withdraw the contested case hearing procedure request.

06031

JUN 26 1998

Approval of the after-the-fact improvements of the existing single family dwelling, seawall, planter and boundary wall, and backfill/lawn improvements is based on the following:

The Shoreline Setback Law was enacted by the State Legislature in 1970 for the protection of the shoreline from undue man-made improvements. Many of these structures have disturbed the natural shoreline processes and caused erosion of the shoreline. Concrete masses along the shoreline are contrary to the policy for the preservation of the natural shoreline and the open space. Unrestricted removal of sand, coral, rocks, etc., for commercial uses can only deteriorate the shoreline and remove it from public use and enjoyment. Moreover, the Hawaiian Islands are subject to tsunamis and high waves which endanger residential dwellings and other structures which are built too close to the shoreline. For these reasons, it is in the public interest to establish shoreline setbacks and to regulate the use and activities within the shoreline setbacks.

The Legislature, however, also recognized that certain activities and improvements may be required or constructed within the shoreline setback area for protection of certain shoreline properties. In recognizing this need, the Legislature authorized the respective authorities within the various counties, in this case the Planning Commission, to grant variances for certain activities and improvements within the shoreline setback area. In accordance with Section 205-35(b) of the Hawaii Revised Statutes, and Section 8-10(b) of the Planning Commission's Rule 8, relating to Shoreline Setback, the Planning Commission may grant variances from the shoreline setback regulations based on the following criteria for approval and denial:

The Planning Director has determined that the Shoreline Setback Variance shall be processed in accordance with Rule 8, Section 8-10 (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 conforms 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.

On April 30, 1996, a Special Management Area Use Permit Assessment Application No. 96-13 was approved on April 30, 1996, and the improvements were determined to be exempt from the definition of "development" pursuant to Rule No. 9-4 (10) (B)(i).

On January 22, 1997, Variance Application No. 751 WH(VAR96-25) was approved for a Variance from Minimum Front Yard and Open Space Requirements to allow an existing two story single family dwelling with a 14.4 feet front yard in lieu of the minimum 15 foot front yard and a 9.9 feet open space in lieu of the minimum 10.0 feet open space as required by Chapter 25, Article 4, Section 25-124(a)(1) and Article 1, Division 10, Section 25-66(a)(1).

Variance Application No. 751 WH(VAR96-25) was approved with the following conditions:

1. The applicant, its assigns or successors, shall be responsible for complying with all stated conditions of approval.
2. The approval of this variance shall be included in the conveyance document for the subject property and a copy of the recorded conveyance document shall be submitted to the Planning Department within a year from the effective date of approval of this variance.
3. Obtain approval from the Board of Appeals for all Housing and Building Code Violations, if applicable.
4. Remove all encroachments into the north side of the parcel.
5. All other applicable State and County rules and regulations shall be complied with.

On February 25, 1997, Findings of Fact, Conclusions of Law, Decision and Order was adopted by the Board of Appeals at its meeting of October 11, 1996, for a Variance from Section 11-18(a)(2) of the Housing Code which requires a side yard setback of 10.0 feet for any building two (2) stories in height. The variance requested relief from the following: 1) retention of the north side yard of the dwelling with a .5 to .9 or average 8 1/2 inch encroachment. The Board of Appeals ordered that the application for variance from Section 11-18(a)(2) of the Housing Code of the Hawaii County Code, to allow encroachment by the existing residence into the required north side yard be granted subject to the following conditions:

1. Petitioner, his successors and assigns shall be responsible for complying with all stated conditions of approval.
2. The approval of this variance shall be included in a declaration document reciting the conditions stated herein for the Property, and a copy of the recorded declaration document shall be submitted to the Planning Department within one (1) year from the effective date of approval of this variance.
3. Petitioner shall remove the stairway and bath/shower area consisting of approximately 288 square feet currently located within the 10-foot north side yard of the property.

In this Shoreline Setback Variance Application, the applicant proposes the following improvements within the 20-foot shoreline setback area: 1) after-the-fact approval of the planter, seawall, rock wall, fill and lawn encroachments into the 20-foot shoreline setback for the property; 2) construct a new at-grade lap pool, approximately 10 feet wide and approximately 38 feet long, surrounded by a ground-level concrete/tile apron approximately three (3) feet wide, fronting the existing single-family dwelling and located within the County's 20-foot shoreline setback area.

The property is situated within the North Kahaalu Beach Subdivision which runs approximately 1 mile along the shoreline. The project area consists of approximately 9,583 square feet of improved lands. The property is fully developed with the six to eight-foot high seawall which was certified on April 26, 1996, and reconfirmed on March 13, 1996, by the Department of Land and Natural Resources. The surrounding areas consist of single family dwellings. The request for the after-the-fact approval of the planter, seawall, rock wall, fill and lawn encroachments is reasonable 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.

Hardship will be caused to the applicant if the after-the-fact approval of the planter, seawall, rock wall, fill and lawn encroachments are not allowed within the shoreline setback area and the applicant would be deprived of reasonable use of their 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.

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 planter, seawall, rock wall, fill and lawn encroachments into the 20-foot shoreline setback for the property may interfere with public access to shoreline areas as designed. There are no air quality monitoring stations in the West Hawaii Region. The existing noise generated in the area is coming 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 anticipated. The request is the practicable alternative which best conforms to the purpose of this rule.

Given the limited nature of the proposed improvements, approval of this request for the planter, seawall, rock wall, fill and lawn encroachments would allow for a reasonable use of land which would not effect the shoreline views, the environment or ecology of the shoreline.

The proposed improvements of the planter, seawall, rock wall, fill and lawn encroachments is consistent with the County General Plan and Zoning Code. The proposed project does conform to the General Plan Land Use Pattern 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.

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

Environmental Quality

- o 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.

Natural Resources and Shoreline

- o Protect and conserve the natural resources of the County of Hawaii from undue exploitation, encroachment and damage.
- o Protect and promote the prudent use of Hawaii's unique, fragile, and significant environmental and natural resources.
- o 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 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.

Approval of this Shoreline Setback Variance request for the after-the-fact improvements of the existing single family dwelling, seawall, planter and boundary wall, backfill/lawn improvements is subject to the following conditions. Should any of the conditions not be met or substantially complied with in a timely manner, the Planning Director may initiate procedures to revoke this permit.

1. The applicant, its successor or assigns shall be responsible for complying with all stated conditions of approval.
2. Construction of the proposed development shall be commenced within one (1) year from the effective date of this permit.
3. The applicant shall comply with the requirements of Department of Public Works.
4. The applicant shall comply with Special Management Area Use Permit Assessment Application No. 96-13, Variance Application No. 751 (WHVAR96-25) and BOA (96-5).
5. Should any remains of historic sites, such as rock walls, terraces, platforms, marine shell concentrations or human burials, be encountered, work in the immediate area shall cease and the Department of Land and Natural Resources-Historic Preservation Division (DLNR-HPD) shall be immediately notified. Subsequent work shall proceed upon an archaeological clearance from

the DLNR-HPD when it finds that sufficient mitigative measures have been taken.

6. An initial 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).

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.

The proposed lap pool improvement does not meet the standards of Rule 8, Section 8-10(b)(3). The at-grade lap pool as designed would be approximately 10 feet wide and approximately 38 feet long surrounded by a ground-level concrete/tile apron and located within the County's 20-foot shoreline setback area. The distance from the edge of the makai concrete/tile apron of the proposed lap pool to the existing seawall is approximately 3 feet. The request for the proposed lap pool improvements is neither a shoreline dependent facility nor an activity undertaken by a public agency or a public utility, thus, it can only be qualified to be processed under the "Hardship" standard. The following findings state the facts to substantiate the Planning Director's recommended denial of the proposed lap pool.

1. The request is not due to unique circumstances related to the land. More importantly, the findings of the evidence weighs heavily on the fact that no hardship has been demonstrated by the applicant that will occur if the proposed lap pool were denied.
2. The applicant will not be deprived of reasonable use of the land if the lap pool is not constructed.

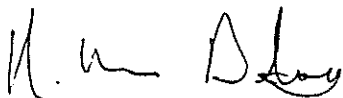
3. The request is not the most practicable alternative which best conforms to the purpose of this rule as the applicant has other alternatives which not only can protect as well as enhance the quality of the property without having to construct the proposed lap pool within the shoreline setback area. A delicate balance between the applicant's property rights and the public interest policies must be weighed carefully with respect to the laws created to protect the public's interest. In this particular matter, the applicant is not being deprived of developing the property. The applicant is asking for a special consideration to develop the property within the shoreline setback area. This special consideration has to be delicately weighed in light of the laws applicable in granting this special consideration. In this particular case, the applicant has not shown any evidence which could satisfy the requirements of Rule 8 (Shoreline Setback), Section 8-10, criteria for approval of a variance.

Based on the above findings, it is determined that the proposed lap pool improvement is not 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.

As stated in Rule 8-19(b) of the Planning Commission Rules of Practice and Procedure, "A decision of the Commission is appealable to the Third Circuit Court."

Should you have any questions, please contact Alice Kawaha of the Planning Department at 961-8288 or Royden Yamasato of the West Hawaii Office of the Planning Department at 327-3510.

Sincerely,



Kevin M. Balog, Chairman  
Planning Commission

LCleme01.pc

cc: Dale and Veronica Clemens  
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Patricia O'Toole, Esq.  
Department of Public Works  
Department of Water Supply  
County Real Property Tax Division  
West Hawaii Office  
Office of Planning, CZM Program (w/Background)  
Department of Land and Natural Resources  
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