

County of Hawai'i

LEEWARD PLANNING COMMISSION

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

August 5, 2010

Mr. Gregory R. Mooers
P.O. Box 1101
Kamuela, HI 96743

Dear Mr. Mooers:

Shoreline Setback Variance Application (SSV No. 10-000005)
Applicant: Kim and Carol Maier
Request: Construction of a Swimming Pool Within the Shoreline Setback Area
Tax May Key: 7-5-5:92

The Leeward Planning Commission at its duly held public hearing on July 23, 2010, voted to approve the above-referenced application to allow the construction of a salt-water swimming pool, concrete deck, and a 4-foot high pool security fence within the 20-foot shoreline setback area. The 7,052 square foot property is situated along the south (makai) side of the Kona Bay Estates private subdivision road, Kona Bay Estates Subdivision, Kailua-Kona, Hawai'i.

Approval of this request is based on the following:

The applicant is requesting a Shoreline Setback Variance to construct a salt-water swimming pool, concrete deck and 4-foot high pool security fence within the 20-foot shoreline setback area. The pool will be approximately 10 feet by 40 feet in size and will be located approximately 5 feet mauka of an existing rock wall that forms the seaward boundary of the property. A concrete deck will surround the pool and a 4-foot high fence will surround the concrete deck. On the subject property, the shoreline has been certified by the State as being located along the makai edge of a 2-foot wide by 3-foot high rock wall situated 20 feet inland from the seaward property boundary. This rock wall and the lava shelf makai of the wall are used by the public as a shoreline public access easement. On March 29, 2004, the Planning Department determined that the property would qualify for a 20-foot minimum shoreline setback (rather than the standard minimum 40-foot shoreline setback) due to the size of the property. As the applicant is requesting to construct the pool and related improvements within the 20-foot shoreline setback area, a Shoreline Setback Variance is required.

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

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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 205A-46(b) of the Hawai'i Revised Statutes, and Section 8-10(b) of the Planning Commission's Rule 8, relating to Shoreline Setbacks, the Planning Commission may grant variances from the shoreline setback regulations.

The request to construct a salt-water swimming pool and related improvements would meet the Hardship Standard of Rule 8, Section 8-10(b)(3). In reviewing the request against the criteria to allow a variance, the Planning Director has determined that the request for a Shoreline Setback Variance to allow the construction a salt-water swimming pool, concrete pool deck, and pool security fence within the shoreline setback area **does meet the criteria** set forth in Rule 8, Section 8-10 (b)(3) regarding hardship to the applicant.

Section 8-10(b)(3) 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 Planning 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.
- (C) If a structure is proposed to artificially fix the shoreline, the Planning Commission must also determine that shoreline erosion is likely to cause hardship if the structure is not allowed within the shoreline setback area.
- (D) Hardship shall not be determined as a result of zoning amendments, planned unit development (PUD) permits, cluster plan development (CPD) permits, or subdivision approvals after June 16, 1989.”

The subject property is 7,052 square feet in size and developed with a single-family residence which was constructed in 2005. When the Kona Bay Estates subdivision was originally created on January 20, 1984, the shoreline was located further seaward of its present location. Over the years the majority of lots within the subdivision have been developed with dwellings and swimming pools located immediately mauka of the rock wall that extends throughout the subdivision parallel to the shoreline. On May 27, 2003, the State re-certified the shoreline and identified it to be located at the makai edge of the 2-foot wide by 3-foot high rock wall, which is a pedestrian beach access walkway easement. As a result of the re-certification the shoreline moved over 20 feet inland from its original location. Due to the small size of the property, there is no practicable alternative space for the pool to be built other than within the shoreline setback area. The applicant would be deprived of reasonable use of the land if required to comply fully with this rule due to the unique circumstances created as a result of the shoreline re-certification in 2003. Additionally, as stated above, there is no reasonable alternative location for the proposed pool on the property.

The request is reasonable in that it will not artificially fix the shoreline and is a reasonable use of the land. The swimming pool will be constructed just makai of a rock wall that in effect already fixes the shoreline. Construction of this rock wall was permitted by SMA Use Permit No. 199 on May 19, 1983, when the subdivision was first developed. The pool and related improvements will not cause erosion of the shoreline because this rock wall creates a fixed barrier between the surf and proposed improvements. Because the property is located in Flood Zones “AE” and “VE” as

defined by FEMA, a condition of approval will require the pool and related improvements will be constructed in compliance with Chapter 27 (Floodplain Management) of the Hawai'i County Code.

Based on the above findings, it is determined that the request is consistent with the Shoreline Setback Law pursuant to Chapter 205A-46 and the criteria established in Rule No. 8 of the Planning Commission's Rules of Practice and Procedure, and this request is approved by the Leeward Planning Commission.

Approval of this Shoreline Setback Variance request is subject to the following conditions:

1. The applicants, their successor or assigns shall be responsible for complying with all stated conditions of approval.
2. The applicants, their 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 and death arising out of any act or omission of the applicants, their successors or assigns, officers, employees, contractors and agents under this variance or relating to or connected with the granting of this variance.
3. Construction of the pool and related improvements shall be completed within two (2) years from the effective date of this variance.
4. The pool and related improvements shall comply with the requirements of Chapter 27 (Floodplain Management) of the Hawai'i County Code.
5. Discharge of swimming pool water to the ocean, groundwater and public sewer system via the Kona Bay Estates private sewer system is prohibited.
6. A Solid Waste Management Plan shall be submitted to the Department of Environmental Management for review and approval prior to the issuance of a Certificate of Occupancy.
7. Prior to any ground disturbing activity the applicant shall provide an archaeological monitoring plan, approved by the State Department of Land and Natural Resources- Historic Preservation Division, to the Planning Department.
8. 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.

9. The applicant shall comply with all applicable County, State and Federal laws, rules, regulations and requirements.
10. 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).
 - E. If the applicant should require an additional extension of time, the Planning Department shall submit the applicant's request to the Planning Commission for appropriate action.

Should any of the conditions not be met or substantially complied with in a timely manner, the Planning Director may initiate to revoke this permit.

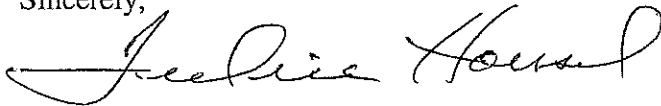
This approval does not, however, sanction the specific plans submitted with the application as they may be subject to change given specific code and regulatory requirements of the affected agencies.

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Should you have any questions, please contact Maija Cottle of the Planning Department at 961-8288.

Sincerely,

A handwritten signature in cursive script that reads "Frederic Housel".

Frederic Housel, Chairman
Leeward Planning Commission

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cc: Kim and Carol Maier
Department of Public Works
Department of Water Supply
County Real Property Tax Division
Planning Department - Kona
Office of State Planning, CZM Program
Department of Land and Natural Resources-HPD
Long Range Planning Division
Zoning Inspector – Kona
Mr. Gilbert Bailado /