



County of Hawai'i

LEEWARD PLANNING COMMISSION

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JUN 08 2012

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

Dear Mr. Mooers:

Shoreline Setback Variance Application (SSV 12-000008)

Applicant: Gregory R. Mooers

Request: To Permit an Existing 82.4-Foot Long Wall Within the
Shoreline Setback Area

Tax Map Key: 6-9-005:001

The Leeward Planning Commission, at its duly held public hearing on May 17, 2012, voted to approve the above-referenced application to allow an existing 82.4-foot long, 2 to 4-foot high wall built within the shoreline setback area to remain in place. The wall is situated along the makai boundary of the subject property, which is located on the makai (west) side of Puakō Beach Drive, Puakō Beach Lots, Lalamilo, South Kohala, Hawai'i.

Approval of this request is based on the following:

The applicant is requesting a shoreline setback variance to allow an existing 82.4-foot long, 2 to 4-foot high wall built within the shoreline setback area to remain in place. The wall is situated generally along the makai property line of the subject property which contains a two-story single-family dwelling and 'ohana dwelling. The wall was built without proper permits and approvals prior to the current landowner purchasing the property in 1997. As the wall has already been constructed, no additional construction is proposed and therefore no construction-related impacts will occur. Given that the wall was constructed within the 40-foot shoreline setback area, a Shoreline Setback Variance is required in order for it to remain in place as a legal structure.

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 uses 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(a) of the Hawai'i Revised Statutes, and Section 8-11(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 would meet the Hardship Standard of Rule 8, Section 8-11(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 an existing wall built within the shoreline setback area to remain in place **does meet the criteria** set forth in Rule 8, Section 8-11(b)(3) regarding hardship to the applicant.

Section 8-11(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 Puakō Beach Lots subdivision was created prior to establishment of the State law related to shoreline setbacks. The lots in this subdivision are zoned RS-10 and developed with single-family residences. Some of the lots have seawalls along their shoreline property boundaries. Many of these walls were constructed within the shoreline setback area prior to establishment of laws related to shoreline setbacks and therefore are considered “grandfathered” seawalls. In the past, the Planning Commission has granted Shoreline Setback Variances for seawalls on two other properties in the subdivision. When the current landowner purchased the subject property in 1997, the subject wall was already in place and was therefore likely built (without the required permits and approvals) by the previous landowner. In 1999, the current landowner obtained the appropriate permits and approvals for constructing a single-family residence and second-story ‘ohana dwelling on the property. It is reasonable to grant this variance, so that the landowner can continue to use the property for residential purposes, for which it is zoned, and was expected when the landowner purchased the property with the seawall already constructed and in place.

The subject wall will artificially fix the shoreline. However, removal of the wall will not be prudent as it will subject the property and adjacent properties (including the mauka-makai public access to the south) to wave and erosion damage, according to the coastal engineering assessment contained in letters dated January 4, 2011 and June 29, 2011 (contained in P.D. Exhibit 1), prepared by EKNA Services, Inc. Removing the wall, which functions as a retaining wall on the north and south side of the property,

would allow the shoreline to immediately achieve a flatter profile, which could cause the shoreline escarpment to move about 30 feet mauka of the existing waterline (i.e. mauka of the base of the existing wall at the north and south sides of the property). Removing the wall will also subject neighboring property walls to flanking damage, meaning that waves can surge around the unprotected end and erode the ground from the mauka side. As the unprotected shoreline continues to erode, ultimately the adjacent shoreline will move landward of the seawall, further increasing the flanking damage to the adjacent walls and mauka residential properties.

The wall does not have detrimental impacts to littoral (relating to the coastal zone between the limits of high and low tides) processes affecting this coastal area. There is no dry sand beach fronting the adjacent properties on the south and north side. The small spit of dry sand fronting the subject property has accumulated as a tombolo (a bar of sand joining an island to the mainland) because of the emergent rock outcrop situated directly offshore. This rock outcrop causes waves to refract/diffract around the outcrop, and the existing wall on the subject property does not alter this pattern of wave approach. The existing seawalls fronting the subject property and adjacent properties are about 2-3 feet higher than the mauka ground elevation. These seawalls may sustain minor overtopping during seasonal storm wave attack, but serve to mitigate flooding damage to the properties.

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 should be approved by the Planning Commission.

Planning Commission Rule, Section 8-11(c) states "No variance shall be granted unless appropriate conditions are imposed as applicable:

- (1) To comply with Chapters 10 and 27 of the Hawai'i County Code relating to Erosion and Sedimentation Control and Flood Control, respectively;
- (2) To maintain safe lateral access along the shoreline or adequately substitute for its loss;
- (3) To minimize risk of adverse impacts on beach processes;
- (4) To minimize risk of structures failing and becoming loose rocks or rubble on public property; and
- (5) To minimize adverse impacts on public views to, from, and along the shoreline."

Because the wall was constructed without the proper planning permits, it is uncertain whether its construction complies with Chapter 10 and 27 of the Hawai'i County Code. However, in their memo dated April 3, 2012, Department of Public Works, which is the agency that administers these chapters of the Code, had no comments or objections regarding the wall.

The shoreline makai of the seawall is accessible most of the time, except during some high tides and during high surf and storm events. In order to maintain lateral public access along the shoreline for fishing and recreational purposes, particularly as sea level continues to rise over time, the Planning Commission may want to consider a condition that allows the public to walk within the shoreline setback area mauka of the seawall during those rare times when the area makai of the seawall is inaccessible. Additionally, a condition will require that the applicant maintain the seawall in a safe condition for the general public.

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

1. The landowner, applicant, successors or assigns shall be responsible for complying with all stated conditions of approval.
2. The landowner, applicant, 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 landowner, applicant, successors or assigns, officers, employees, contractors and agents under this variance or relating to or connected with the granting of this variance.
3. In order to ensure access along the shoreline for fishing and recreational purposes that the public has enjoyed for many years in this area, the landowner, applicant, successors or assigns shall not impede or otherwise restrict lateral pedestrian access in an area six (6) feet mauka of the seawall where the wall establishes the shoreline during times that the area makai of the seawall is inaccessible due to high water.
4. The landowner, applicant, successors or assigns shall maintain the seawall on the subject property in a safe condition so that loose rocks and rubble do not adversely affect adjacent public properties.

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5. The landowner, applicant shall comply with all applicable County, State and Federal laws, rules, regulations and requirements.

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 variance.

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 contact Daryn Arai of the Planning Department at 961-8288.

Sincerely,



Geraldine Giffin, Chairman
Leeward Planning Commission

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cc: Department of Public Works
Department of Water Supply
County Real Property Tax Division
Planning Department - Kona
Office of State Planning, CZM Program
Long Range Planning
Zoning Inspector - Kona
Mr. Gilbert Bailado ✓