

William P. Kenoi
Mayor



BJ Leithead Todd
Director

Margaret K. Masunaga
Deputy

County of Hawai'i

PLANNING DEPARTMENT

Aupuni Center • 101 Pauahi Street, Suite 3 • Hilo, Hawai'i 96720
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Corrected Date: Nov. 8, 2013

July 15, 2009

Paul H. Murray, LPLS
Paul H. Murray & Associates, LLC
PO Box 1189
Hilo, Hawaii 96721-1189

Dear Mr. Murray:

SUBJECT: VARIANCE-- 07-091

Applicant: PAUL H. MURRAY, LPLS

Owners: HARRY E. SCHMIDT

**Request: Variance from Chapter 25, zoning, Article 5, Division 7,
Section 25-5-76, Minimum Yards, (a), Section 25-5-77
Other regulations, and Article 4, Division 4 Section 25-4-
44, Permitted projections into yards and open space
requirements**

TMK: 1-6-011:094 (Lot 71)

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**Note: Correction of parcel number done by
the Planning Department**

After reviewing your variance application, the Planning Director certifies the **approval** of Variance No. 07-091 (VAR 07-091) subject to variance conditions. The variance permits portions of the detached "Open Carport/Storage/Eaves" and detached "Water Tank" to remain upon Lot 71 with a minimum 17.4 feet to a minimum feet side yard and attendant minimum 15.9 to minimum 16.9 feet side yard open space; and portions of the water tank with minimum 9.0 feet side yard and attendant minimum 9.0 feet side yard open space to remain on Lot 71 in lieu of the required minimum 20 feet side yard and minimum 14 feet front yard open space pursuant to the variance application site plan dated September 6, 2007. The variance is from the subject property's minimum side yard open space requirements pursuant to the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), Section 25-5-77 Other regulations, and Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open space requirements, (a).

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BACKGROUND AND FINDINGS

1. Location. The subject property, consists of 2 acres in land area and is situated within the Orchid Land Estates, Subdivision, Puna, Hawai'i. The subject property's street address is 16-1559 37th Avenue. The subject property is zoned Agricultural – 3 Acres (A-3a) by the County and designated Agricultural or "A" by the State Land Use Commission (LUC).
2. Variance Application-Site Plan. The applicant on behalf of the owner submitted the variance application, attachments, and filing fee on December 13, 2007 and other submittals related to the variance request and variance application. The variance application's site plan map is drawn to scale and prepared by Paul H. Murray, LPLS. The variance site plan map, dated September 6, 2007, denotes the position of "Open carport/storage/eaves " and detached "Water Tank" upon the subject property and that portion of the carport/office constructed into minimum 20-foot wide side yard setback and minimum 14-foot wide side yard open space.
3. County Building Records:

Hawaii County Real Property Tax Office records indicate that a building permit (B2007-1569H) was issued to the subject property for the construction of a single family dwelling consisting of 1 bedroom, 1 bath, living room, kitchen and dining area, detached carport/storage and galvanized steel water tank.
4. Variance Application (VAR 08-050)-Agency Comments and Requirements:
 - a. The State Department of health (DOH) memorandum dated December 26 2007 states:

"The Health Department found no environmental health concerns with regulatory implications in the submittals."
 - b. The Department of Public Works (DPW) had no comments, memo dated January 9, 2008.
5. Notice to Surrounding Property Owners. A copy of first notice and second notice sent by the applicant via USPS to surrounding property owners and mailing certificates were submitted to the Planning Department. According to these

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submittals the first and second notices were mailed via the USPS on December 28, 2007 and January 4, 2008, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on December 26, 2007.

6. Comments from Surrounding Property Owners or Public.

- a. Objection letters received on February 1 & 5, 2009 signed by Ernest and Genevieve Tuliao

SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant/owner, submitted the variance application to address and/or resolve the open carport/storage encroachments within the property's minimum 20 feet side yard. The variance application's site plan denotes the location of the open carport/storage and water tank upon "Lot 71". Pursuant to the applicant's background information, "The owners were unaware of any encroachment when they purchased the property and would not have discovered any problems affecting this open carport/storage and detached water tank until a modern survey was conducted on September 7, 2007 by Paul H. Murray and Associates, LLC revealing the setback violations. No evidence has been found to show indifference or premeditation by the builder to intentionally construct a portion of the carport/storage/eaves and detached Water Tank into the property's minimum 20 feet side yard setback and attendant minimum 14 feet side yard open space required by the Zoning Code.

ALTERNATIVES

Alternatives available to the current owners to correct and/or address the building encroachments constructed into the affected side yard and open space of the subject property include the following actions:

Remove the building encroachments and/or redesigning or relocating the as-built Open Carport/Storage/Eaves and Water Tank constructed upon the subject property to fit within the correct building envelope denoted on the recent survey map as prescribed by the Zoning Code. Any structural or design correction would be expensive and cost prohibitive.

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Consolidate the subject property with adjoining property and resubdivide the property to modify property lines and adjust minimum yard setbacks.

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 portion of the carport/storage/eaves and detached water tank was improperly situated on the subject property, which went undisclosed until the sale of this property was placed in escrow. The survey map prepared for the landowner shows the extent of the encroachment within the minimum side yard and its open space requirement. It appears that the carport/storage/eaves and detached water tank, in its current location, is not physically and/or visually obtrusive from other properties situated within the immediate area. This can be substantiated, to some degree, by the fact that this office did not receive any complaint from surrounding property owners during the roughly 2-plus years since the carport and water tank was constructed. As such, it is felt that the issuance of this variance will not depreciate or detract from the character of the immediately surrounding properties. A landowner adjacent to the subject property did express an objection to this request, but no reason or explanation was given. We see absolutely no evidence of such adverse impact to their property

Based on the foregoing findings and unusual circumstances, the representative's request for 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.

The applicant's variance application was acknowledged by letter dated December 18, 2007 and additional time to review the application was required. The applicant granted the Planning Department and Planning Director an extension of time to decide on the variance application to July 22, 2009.

PLANNING DIRECTOR'S DECISION AND VARIANCE CONDITIONS

This variance application is 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 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. No permit shall be granted to allow an ohana or second single family or farm dwelling upon the subject TMK property, subject to provisions of the Zoning Code or State Law which may change from time to time.
4. The as-built open carport/storage and water tank to be built upon the subject property ("LOT 71") will not meet the minimum side yards pursuant to Chapter 25, the Zoning Code, according to the variance application's site plan map. The approval of this variance permits portions of the as-built carport/office to remain upon subject TMK property or "LOT 71" according to the site plan map submitted with the variance application.
5. Should the as-built open carport/storage and water tank (footprint) upon the subject property be destroyed by fire or other natural causes, the replacement or the new carport/office shall comply with the County Zoning Code and be subject to State law and County ordinances and regulations pertaining to building construction occupancy.
6. 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.

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Should any of the foregoing variance conditions not be complied with, the Planning Director may proceed to declare subject Variance-VAR 07-091 null and void.

Sincerely,



BJ LEITHEAD TODD
Planning Director

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xc: Real Property Tax Office (Hilo)