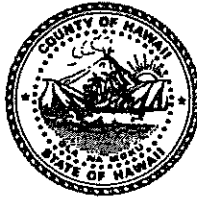


**Harry Kim**  
Mayor



**Christopher J. Yuen**  
Director

**Brad Kurokawa, ASLA**  
**LEED® AP**  
Deputy Director

**County of Hawaii**  
**PLANNING DEPARTMENT**

101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720-4224  
(808) 961-8288 • FAX (808) 961-8742

September 15, 2008

Ms. Margery Mayo  
P. O. Box 383091  
Waikoloa, HI 96738

Dear Ms. Mayo:

**VARIANCE-VAR 08-040**

**Applicant: MARGERY MAYO**

**Owners: ERIC GUERRERO, ET AL.**

**Request: Variance from Chapter 25, Zoning,  
Minimum Yards**

**Tax Map Key: 4-3-013:002, Lot 200**

After reviewing your variance application, the Planning Director certifies the approval of Variance-VAR 08-040 subject to variance conditions. The variance allows portion of "HOUSE" attached open "DECK", and attendant roof "EAVE" to remain upon "PARCEL 200" with minimum 18.80 feet to minimum 20.00 feet side yard and attendant minimum 7.14 feet to minimum 14.00 feet side yard open space in lieu of minimum 20.00 feet side yard and attendant minimum 14.00 feet side yard open space requirement according to the variance application's site plan or survey map signed and dated June 16, 2008. The variance is from the TMK property's minimum side yard pursuant to the Hawaii County Code, Chapter 25, Zoning, Article 5, Division 7, Section 25-5-76, Minimum yards., and Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open space requirements, (a).

**BACKGROUND AND FINDINGS**

1. **Location.** The referenced TMK property, containing 11.485 acres, is situated at Paauilo Homesteads, Second Series, Paauilo, Hamakua, Hawaii.

The property is zoned Agriculture (A-5a) by the County and designated Agriculture or "A" by the Land Use Commission (LUC).

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2. **Variance Application-Site Plan.** The applicant, on behalf of owners, submitted the variance application, attachments, and filing fee on June 19, 2008 and authorization letter on July 29, 2008. The variance application's site plan map is drawn to scale and prepared by Kona Surveyors Inc. The variance site plan map, signed and dated June 16, 2008 denotes portions of "HOUSE", attached "DECK", and "EAVE" are built into a minimum 20 feet side yard of "PARCEL 200" or subject TMK property.

The applicant's attachment dated "June 2008" states in part:

"The construction of the house was started in 2003. The Contractor/builder was Fentiman DeCambra.

An old barb-wire fence separated our property from the adjoining cow pasture. This is the fence line the contractor/builder used as a reference point to construct the house.

The notice of completion was filed by Mr. DeCambra November 2004.

In 2007 the owners of the adjacent property tore down and put in a new fence bringing the new fence closer to the house.

In April the property was surveyed because the house was in escrow. The survey now shows the house is encroached into the existing setback. The new fence is on the adjacent property's boundary line.

I believe due to the builder's error, I will be penalized for his mistake. This will affect resale of the property and probably other issues that I am not aware of currently."

**Note:** The variance site plan map does not identify the location of the cesspool or Independent Wastewater System (IWS). The variance request does not address the location or position of enclosed garage, galvanized water tank, constructed upon the property and any fencing or landscaping, etc. along or straddling common boundary lines.

3. **County of County-DPW-Permit Records:**

Hawaii County Real Property Tax records show 1-Building Permit (030440), 1-Electrical Permit (E031347), and 1-Mechanical (M030837) or Plumbing Permit issued to subject TMK property. It appears that the dwelling upon the subject TMK property was built pursuant to building and associated construction permits issued circa 2003 and completed in 2004.

4. **Variance Application-VAR 08-040-Agency Comments and Requirements:**

- a. The State of Hawaii-Department of Health (DOH) memorandum dated July 8, 2008 states:

"The Health Department found no environmental health concerns with regulatory implications in the submittals."

- b. The Department of Public Works (DPW) memorandum or comments dated July 24, 2008 states in part:

"NO COMMENTS"

5. **Notice to Surrounding Property Owners.** The applicant submitted copy of mailing receipts and other submittals regarding notice of variance sent to surrounding property owners. According to the applicant's submittals, it appears that the applicant mailed first notice, second notice, and revised second notice to surrounding property owners by USPS on June 27, 2008, August 2, 2008, and August 28, 2008, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on July 11, 2008.

6. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. No written comments or objections from surrounding property owners or the general public were received.

### **SPECIAL AND UNUSUAL CIRCUMSTANCES**

The applicant, on behalf of the owners, submitted the variance application to address or resolve the portions of the dwelling/deck/eave built into the property's minimum 20 feet side yard. The variance application's site plan map prepared by Kona Surveyors Inc signed and dated June 16, 2008 by a surveyor denotes the dwelling position and other building improvements upon "PARCEL 200". The applicant and owners became aware of building encroachment issues during escrow. According to the applicant background information the portions of the dwelling/deck/eave constructed into the property's minimum side yard is "due to the builder's error". However, no evidence was found to show indifference or premeditation by previous owners or the contractor/builder to deliberately create or intentionally allow the portion of the dwelling to be built within the property's minimum 20 feet side yard and attendant minimum 14 feet side yard open space required by the Zoning Code.

It appears that the dwelling including open deck and associated roof eave was completed in 2004 pursuant to a building permit and 2-associated construction permits issued to subject TMK property circa 2003. It appears that during construction of the dwelling and deck/eave improvements between 2003 and 2004 a portion of the dwelling/deck/eave within the property's minimum 20 feet side yard went unnoticed by the builders, owners, and agencies.

### **ALTERNATIVES**

Alternatives available to the applicant to address and correct the existing building encroachments include the following actions:

1. Remove portions of the dwelling redesigning or relocating the dwelling including deck/roof eave to fit within the correct building envelope prescribed by the Zoning Code.
2. Consolidation of "PARCEL 200" with adjoining lot (TMK: 4-3-013:007) and resubdivision to modify property lines or adjust minimum side yards, etc.

### **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 dwelling/deck and associated roof eave constructed approximately 4-years ago into the property's minimum 20 feet side yard are not physically and/or visually obtrusive from the adjoining TMK property or privately owned right-of-ways. It appears that the portions of the dwelling and deck/eave do not depreciate or detract from the character of the surrounding neighborhood (rural-pasture) and surrounding land patterns. Therefore, it is felt that portion of the dwelling/deck/roof eave built into the property's affected side yard and attendant minimum side yard open space identified on the variance application's site plan map will not detract from the character of the immediate neighborhood or the subdivision and may remain by variance.

The subject variance application was acknowledged by letter dated July 2, 2008 and applicant required additional time to send revised notice to surrounding property owners was necessary. The applicant requested a time extension and granted the Planning Director an extension of time to render decision on the variance application to September 30, 2008.

Based on the foregoing findings, this 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.

#### **PLANNING DIRECTOR'S DECISION AND VARIANCE CONDITIONS**

This variance request is approved subject to the following 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.

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3. Portions of the dwelling or "HOUSE/DECK/EAVE" constructed upon "PARCEL 200" will not meet the property's minimum side yard and attendant minimum side yard open space requirement pursuant to Chapter 25, the Zoning Code, according to the variance application's site plan map signed and dated June 16, 2008. The approval of this variance permits portions of "HOUSE/DECK/EAVE" improvements built into and upon the subject TMK property's side yard or upon "PARCEL 200" according to the variance site plan map.
4. No permit shall be granted to allow an ohana dwelling or building permit issued to allow construction of an "ohana" dwelling shall be granted to the subject TMK property, subject to provisions of the Zoning Code or State Law which may change from time to time.
5. 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.

Should any of the foregoing conditions not be complied with, the Planning Director may proceed to declare this Variance Permit null and void.

Sincerely,



CHRISTOPHER J. YUEN  
Planning Director

WRY:cs

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xc: Real Property Tax Office-Hilo