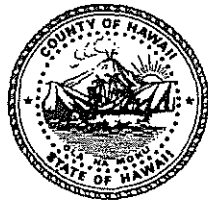


William P. Kenoi  
Mayor



BJ Leithead Todd  
Director

Margaret K. Masunaga  
Deputy

## County of Hawaii

### PLANNING DEPARTMENT

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

September 14, 2009

Mr. Frank Duarte  
P.O. Box 5290  
Hilo, HI 96720

Dear Mr. Duarte:

**SUBJECT: VARIANCE- VAR-08-050**  
**Applicant: FRANK DUARTE**  
**Owners: FRANK DUARTE**  
**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: 1-5-039:077 (Lot 317)**

After reviewing your variance application, the Planning Director certifies the **approval** of Variance No.-08-050 (VAR 08-050) subject to variance conditions. The variance permits portions of the attached open carport/office to remain upon Lot 317 with a minimum 15 feet side yard and minimum 14.0 feet side yard open space. Pursuant to the variance application site plan submitted on August 5, 2008. The variance is from the subject property's minimum side yard and 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).

SEP 18 2009

## BACKGROUND AND FINDINGS

1. Location. The subject property, consists of 1 acre in land area and is situated within the Hawaiian Paradise Park Subdivision, Puna, Hawai'i. The subject property's street address is 15-1561 22<sup>nd</sup> Avenue. The subject property is zoned Agricultural – 1 Acre (A-1a) by the County and designated Agricultural or "A" by the State Land Use Commission (LUC).
2. Variance Application-Site Plan: The owner submitted the variance application with attachments, and filing fee on August 5, 2008 and other submittals related to the variance request and variance application. The variance application's plot plan map is drawn to scale and prepared by Kathleen De Silva. The variance plot plan denotes the position of "carport/office" upon the subject property and denotes portions of the as built carport/office were built into the property's minimum 20-foot wide side yard setback.

3. County Building Records:

Hawaii County Real Property Tax Office records indicate that a building permit (B2004-1769H) was issued to the subject property for the construction of a single family dwelling consisting of 3 bedrooms, 2 ½ baths, living room, kitchen and dining area. Building Permit 2005-0381H was issued to convert existing carport to enclosed garage with overhead door. There is an open permit (B2005-0382) for construction of a new 20 x 20 open covered gazebo.

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) memorandum dated October 16, 2008 states:

*"We have reviewed the subject application forwarded by your memo dated September 23, 2008 and require approval of the application be conditioned as noted below."*

Mr. Frank Duarte  
Page 3  
September 14, 2009

*The owner must apply for building and electrical permits for the illegal carport and office within three months of variance approval.*

*Please refer questions to the Building Division at 961-8331."*

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 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. No written comments or objections from surrounding property owners or the general public were received by the Planning Department.

#### SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant/owner submitted the variance application to address and/or resolve the carport/office encroachment within the property's minimum 20 feet side yard. The variance application's site plan denotes the location of the as-built carport/office, dwelling and other site improvements upon "Lot 317". The owner/applicant became aware of the encroachment when he tried to obtain a building permit to legitimize the as built garage/office that was constructed with out proper building permits by the previous owner. No evidence has been found to show indifference or premeditation by the builder to intentionally construct a portion of the carport/office 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 carport/office being constructed upon the subject property to fit within the correct building envelope denoted on the recent survey map as prescribed by the Zoning Code.

Mr. Frank Duarte  
Page 4  
September 14, 2009

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 as-built carport/office was improperly situated on the subject property, which went undisclosed until the sale of this property was placed in escrow. The site plan map prepared for the landowner by Kathleen De Silva shows the extent of the encroachment within the minimum side yard and its open space requirement. It appears that the carport/office, 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 carport/office did not receive any complaint from surrounding property owners. As such, it is felt that the issuance of this variance will not depreciate or detract from the character of the immediately surrounding properties. It appears that the carport/office encroachment does not depreciate or detract from the character of the surrounding neighborhood and surrounding land patterns. Therefore, it is felt that the portions of the carport/office constructed into the affected side yard denoted on the variance application's site plan map will not detract from the character of the immediate neighborhood or the subdivision.

The applicant's variance application was acknowledged by letter dated September 23, 2008 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 June 30, 2009.

Based on the foregoing findings and unusual circumstances, the applicant'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.

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

This variance application is approved subject to the following variance conditions:

Mr. Frank Duarte  
Page 5  
September 14, 2009

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 built upon the subject property ("LOT 317") 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 317" according to the site plan map submitted with the variance application.
5. The owner shall comply with Department of Public Works condition stating:  
"The owner must apply for building and electrical permits for the illegal carport and office within three months of variance approval."
6. Should the as-built open carport/office (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.
7. 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

Mr. Frank Duarte  
Page 6  
September 14, 2009

Should any of the foregoing variance conditions not be complied with, the Planning Director may proceed to declare subject Variance-VAR 08-050 null and void.

Sincerely,

A handwritten signature in cursive script, appearing to read "BJ Leithead Todd".

BJ LEITHEAD TODD  
Planning Director

LHN:mad  
P:\Variances\Zone1\Var08-050TMK1-5-039-077Duarte.doc

xc: Real Property Tax Office (Hilo)