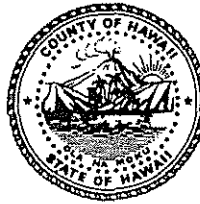


William P. Kenoi
Mayor



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
Phone (808) 961-8288 • Fax (808) 961-8742

September 8, 2009

Paul H. Murray, LPLS
Paul H. Murray & Associates, LLC
PO Box 1189
Hilo, Hawai'i 96721-1189

Dear Mr. Murray:

SUBJECT: VARIANCE- VAR-08-076

Applicant: PAUL H. MURRAY, LPLS

Owners: MICHAEL A. SANTOS, ET AL.

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: 1-8-072:056 (Lot 368)

After reviewing your variance application, the Planning Director certifies the **approval** of Variance No. 08-076 (VAR 08-076) subject to variance conditions. The variance permits portions or corner(s) of the "New Dwelling" to remain upon Lot 368 with a minimum 14.8 feet front yard and a 7.1 feet side (southeast) yard and attendant minimum 3.1 feet side yard open space along with the dwelling's attached open patio to remain with a minimum 7.7 feet side (northwest) yard and attendant minimum 3.7 feet side yard open space in lieu of the required minimum 15 feet front yard and a minimum 8.00 feet side yard(s) and attendant minimum 4 feet side yard(s) open space requirements according to the variance application's survey map dated October 7, 2009. The variance is from the subject property's minimum front and side yard setback 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 14 2009

BACKGROUND AND FINDINGS

1. Location. The subject property, consists of 7,700 square feet in land area and is situated within the Pacific Paradise Mountain View Manor, Subdivision, Puna, Hawai'i. The subject property's street address is 18-7892 Henele Road. The subject property is zoned Agricultural – 5 Acres (A-5a) 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 owners submitted the variance application, attachments, and filing fee on December 22, 2008 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 October 7, 2008, denotes the position of the single family dwelling and open patio situated on the subject property and that portion of the single family dwelling and open patio constructed into minimum 15-foot wide front and 8-foot side yard setback and minimum 4 foot side open space requirement.
3. County Building Records:

Hawaii County Real Property Tax Office records indicate that a building permit (B2008-1209H) was issued to the subject property for the construction of a single family dwelling consisting of 3 bedrooms, 2 baths, living room, kitchen and dining area, attached garage and galvanized steel water tank.
4. Variance Application (VAR-08-076)-Agency Comments and Requirements:
 - a. The State Department of Health (DOH) memorandum dated February 10, 2009 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 February 24, 2009.

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5. Notice to Surrounding Property Owners. The applicant filed a transmittal letter dated and copy of notices sent to surrounding property owners via USPS to the Planning Department. According to USPS certificate of mailing receipts and affixed postal receipts, the first and second notice was mailed on December 22, 2008 and February 12, 2009, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on February 11, 2009
6. Comments from Surrounding Property Owners or Public. No further written agency comments were received. No written comments or objections from surrounding property owners of the general public were received.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant/owner submitted the variance application to address and/or resolve the single family dwelling and open patio encroachments within the property's minimum 15 feet front and 8 feet side yard setbacks. The variance application's site plan denotes the location of the single family dwelling and open patio situated on the subject property (Lot 386). Pursuant to the applicant's background information, the owners were unaware of any encroachment and would not have discovered any problems affecting the single family dwelling and open patio until a modern survey was conducted on October 7, 2008 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 portions of the single family dwelling and open patio into the property's minimum 15 feet front and 8 feet side yard setback and attendant minimum 10 feet front and 4 feet side yard open space required by the Zoning Code. The encroachments into the front yard and northwest side yard building setback are relatively small and would qualify under the De Minimis Yard Encroachment criteria.

ALTERNATIVES

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

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Remove the building encroachments and/or redesigning or relocating the as-built single family dwelling and open patio 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.

Another alternative is to consolidate the subject tax map key property with the road right-of-way (Henele Road) fronting the subject property and the adjoining side yard properties and resubdivide consolidated properties to modify property lines and adjust minimum front and side yard setbacks. It is felt, that this option is not practical and reasonable.

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 single family dwelling and open patio was improperly situated on the subject property, which went undisclosed until a modern survey was completed. The survey map prepared for the landowner shows the extent of the encroachment within the minimum front and side yard and its open space requirement. It appears that portion of the single family dwelling and open patio, 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 construction of the single family dwelling and open patio. As such, it is felt that the issuance of this variance will not depreciate or detract from the character of the immediately surrounding properties.

Based on the foregoing findings and unusual circumstances, the representative's request for variance 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 June 18, 2009 and additional time to review the application was required. The applicant granted the

Planning Department and the Planning Director a time extension to decide on the variance application to September 8, 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 an additional 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 single family dwelling and open patio built upon the subject property ("LOT 368") 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 single family dwelling and open patio to remain upon subject TMK property or "LOT 368" according to the site plan map submitted with the variance application.
5. Should the single family dwelling and open patio situated on the subject property be destroyed by fire or other natural causes, the replacement or the new single family dwelling and open carport 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-08-076) null and void.

Sincerely,



BJ LEITHEAD TODD
Planning Director

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xc: Real Property Tax Office (Hilo)