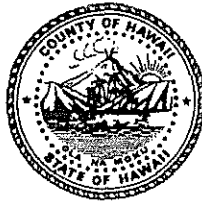


William P. Kenoi
Mayor



BJ Leithead Todd
Planning Director

Margaret K. Masunaga
Deputy Planning Director

County of Hawaii

PLANNING DEPARTMENT

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

May 14, 2009

Ms. Veronica Sutherland, Trustee
Beatrice DeCosta Trust
P.O. Box 108
Arnoldsville, GA 30619

Dear Ms. Sutherland:

VARIANCE-VAR 09-002

Applicant: VERONICA SUTHERLAN

Owner: BETRICE DE COSTA TRUST

**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**

Tax Map Key 1-1-028:101, Lot 36

After reviewing your variance application, the Planning Director certifies the **approval** of Variance-VAR 09-002 subject to variance conditions. The variance permits portions of 1-story single family dwelling and attached carport to remain upon Lot 36 with minimum 12.83 feet side yard and attendant minimum 8.45 feet side yard open space in lieu of minimum 20.00 feet side yard and attendant minimum 14.00 feet side yard open space requirements pursuant to site plan map dated January 12, 2009. The variance is from subject TMK property's minimum side yard and minimum side yard open yard 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.

BACKGROUND AND FINDINGS

1. **Location**: The referenced TMK property, Lot 36 containing 3.00 acres, is within Block C-C, Fern Forest Vacation Estates, and situated at Keaau, Puna, Hawaii. The subject property's street address is 11-2207 Ohialani Road.
2. **Zoning**: The subject property is zoned Agricultural (A-3a) by the County and designated Agriculture or "A" by the State Land Use Commission (LUC).
3. **Variance Application-Site Plan**. The applicant submitted Variance Application-VAR 09-002, attachments, and filing fee on January 23, 2009. The variance application's site plan map is drawn to scale and prepared by The Independent Hawaii Surveyors, LLC. The variance site plan or survey map, dated January 12, 2009, denotes the position of "House" upon the subject property and denotes portions of the "HOUSE" and attached "CAR PORT" were built into the property's minimum 20-foot wide side yard setback.
3. **County Building Records**: The Hawaii County Real Property Tax Office permit records indicate that building permit-B2006-0179H was issued on to the subject property for the construction of a one-story, 4-bedroom, 3-bath, single family dwelling. This dwelling remains under construction.
4. **Variance Application (VAR 08-069)-Agency Comments and Requirements**:

Reviewing agencies did not express any concerns or objections regarding the requested variances.
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 February 2, 2009 and February 14, 2009, respectively. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on February 14, 2009.
6. **Comments from Surrounding Property Owners or Public**. The following written comments from surrounding property owners were received by the department:
 - 6a. Objection letter dated February 16, 2009 from John H. West for the Grace Stowell Living Trust citing devaluation of property, complication in future development of property and its resale, obstruction of view and access for future development, etc.

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6b. Email dated March 24, 2009 from Michelle Tong, on behalf of her mother, expressing concern. **Note: Planner Daryn Arai spoke with Ms. Tong on April 30, 2009 at approximately 3:15pm to discuss concerns. After identifying her family property (TMK: 1-1-028:109) or parcel 109 which is the 3rd lot or located approximately 250 feet away or southwest of the subject TMK, Ms. Tong indicated that she did not have any concerns or objections to the variance request.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant-trustee is currently trying address the setback issue after the survey map was prepared for escrow purposes. The applicant, on behalf of the trust, submitted the variance application to address or resolve the encroachment of the single family dwelling into the minimum 20 feet side yard setback and 14-foot wide minimum open space as required by the Zoning Code.

Pursuant to April 30, 2009 meeting between staff planner Daryn Arai and Veronica Sutherland, trustee of the Beatrice DeCosta Trust, the building permit issued to construct the family dwelling was obtained by other family member(s) for Beatrice DeCosta after Mrs. DeCosta passing in October 2005. No evidence has been found to show indifference or premeditation by the builder to intentionally construct a portion of the dwelling/carport 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 applicant or trustee to correct and/or address the building encroachment built into the property's side yard and attendant side yard open space include the following actions:

Remove the portions of the encroachments identified by the variance site plan map and/or redesigning or relocating the dwelling to fit within the correct the property's building envelope prescribed by the Zoning Code and denoted on the recent survey map.

Consolidation of subject property with adjoining property and resubdivision to modify property lines and adjust minimum yard setbacks, 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 and carport constructed into the minimum side yard went undetected prior to escrow. The survey map prepared for escrow purposes shows the extent of the dwelling/carport encroachment into the property's minimum side yard. It appears that the dwelling/carport, in the present location, is not physically and/or visually obtrusive from the abutting properties, privately owned right-of-way, and surrounding neighborhood. This can be substantiated, to some degree, by the fact that the Planning Department and other reviewing agencies did not receive any complaint from surrounding property owners after commencement of dwelling's construction circa 2006. As such, it is felt that variance to permit the dwelling to remain in accordance with the survey map will not depreciate or detract from the character of the immediately surrounding properties.

The applicant-trustee agreed to an extension of time to incorporate additional background information and granted the Planning Director an extension of time to render decision on Variance Application-VAR 09-002 to May 18, 2009.

Based on the findings and other unusual circumstances, the applicant or trustees request for variance to allow the dwelling to remain in accordance with the recent site or survey map 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 and approval of the variance application 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

Variance Application-VAR 09-02 **is approved** subject to 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.

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Beatrice DeCosta Trust

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3. Portions of the dwelling and carport being built upon the subject property ("LOT 36") pursuant to Building Permit- B2006-0179H and denoted on the survey map dated January 12, 2009 will not meet the minimum side yard and attend minimum side yard open space pursuant to Chapter 25, the Zoning Code. The approval of this variance permits portions of the portions of the 1-story dwelling and carport to remain upon subject TMK property or upon "LOT 36" in accordance with survey map dated January 12, 2009.
4. The applicant, its successors or assigns shall complete improvements according to Building Permit-B2006-0179H and/or in accordance with any other building permit(s) issued to subject TMK property by the DPW-Building Division (Hilo) Hawaii. Any further building permit and/or other construction permits issued to enlarge or change or modify the dwelling floor plan being built upon subject TMK property shall be limited to the dwelling footprint permitted by variance and/or constructed upon the dwelling's footprint and within building envelope denoted on survey map dated January 12, 2009.
5. Should the dwelling or building improvements constructed pursuant to B2006-0179H be destroyed by fire or other natural causes, the replacement or new dwelling including the carport shall comply with the County Zoning Code and be subject to State law and County ordinances and regulations pertaining to building construction and building occupancy.
6. 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.
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.

Should any of the foregoing variance conditions not be complied with, the Planning Director may proceed to declare subject Variance-VAR 09-002 null and void.

Sincerely,



BJ LEITHEAD TODD

Planning Director

DSA/WRY:

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Beatrice DeCosta Trust

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xc: Real Property Tax Office-(Hilo)
John H. West for the Grace Stowell Living Trust
Michelle Tong
